Office-Supreme Court, U.S.
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CLERK

82-1388

No. .. - ...

IN THE

Supreme Court of the United States

October Term, 1982

CONTINENTAL AIR LINES, INC.,

Petitioner,

vs.

CAROLE A. GERDOM,

Respondent,

and

UNION OF FLIGHT ATTENDANTS, LOCAL NO. 1,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

The questions presented by this ruling are:

I.

Whether a finding of intentional sex-based disparate treatment in violation of Title VII may be based solely on a policy applicable only to a single-sex group.

II.

Whether an employment practice applicable to an all-female occupation is justified under Title VII only if shown to improve performance of those job functions recognized by the Court of Appeals.

III.

Whether the Ninth Circuit's *per se* rule that an employment practice affecting an all-female occupation and no male employees constitutes a prima facie Title VII violation is erroneous in light of its conflict with rulings of the Fifth and First Circuits.

IV.

Whether a Court of Appeals' independent factual determination of intentional discrimination, the ultimate issue in a Title VII case, is proper when neither that issue nor a disparate treatment theory of discrimination was ever addressed by the Trial Court.

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UNION OF FLIGHT ATTENDANTS, LOCAL NO. 1,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner Continental Air Lines, Inc.[1] prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case.

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[1]The Rule 21.1(b) listing of parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of petitioner is: Jet Capital Corporation; Texas Air Corporation; Airline Development Corporation; New York Airlines, Inc.; Texcon Mergerco, Inc.; Continental Airlines Corporation; Continental Air Lines, Inc.; Texas International Airlines, Inc.; Continental Computer Services, Inc.; One Continental Plaza, Inc.; Golden Jet Flight Kitchens, Inc.; Continental Hotels, Inc.; Continental-Truk Hotel Corporation; Rubicon Indemnity, Ltd.; Texas International Airlines; Continental Agana Hotel Corporation; Continental Kalakaua Hotel Corporation; Continental Palau Hotel Corporation; Continental Saipan Hotel Corporation; Air Micronesia; Texas International Airlines Finance, N.V.; Texas International Airlines Capital, N.V.; Texas International Airlines Overseas, N.V.; Texas International Airlines Demexico, S.A.; Texas International Airlines Finance (Europe), B.V.; Texas International Airlines TXIA Holdings Corp.

OPINIONS BELOW.

The *en banc* opinion of the Court of Appeals for the Ninth Circuit is officially reported at 692 F.2d 602 (9th Cir. 1982), unofficially reported at 30 FEP Cases 235, 30 CCH EPD ¶ 33156, and is set forth in Appendix A. The panel opinion of the Court of Appeals for the Ninth Circuit is officially reported at 648 F.2d 1223 (9th Cir. 1981), unofficially reported at 26 FEP Cases 601, 26 CCH EPD ¶ 31921, and is set forth in Appendix B. The opinion of the District Court for the Central District of California which is not reported is set forth in Appendix C.

JURISDICTION.

The *en banc* judgment of the Court of Appeals for the Ninth Circuit was entered on November 15, 1982. This petition for writ of certiorari was filed within ninety (90) days thereof. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

PRELIMINARY STATEMENT.

Rarely has judicial activism been more apparent or more overreaching than in this case where the airline industry is instructed by a sharply divided Court of Appeals that any standard applicable to an all female occupation will, without any comparison to standards applicable to men, itself support a Title VII finding of intentional sex discrimination unless shown to improve job performance.

Stating that the previous opinions rendered in this case subjected plaintiffs to "needlessly burdensome" legal standards, the majority *en banc* opinion, by a six to five vote,[2] adopted a *per se* theory of intentional sex discrimination in

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[2]Of the 13 judges who have considered this matter on appeal (first as a panel and then *en banc*) seven have rejected the theory adopted by the majority opinion.

which the airline's standard itself establishes not only the requisite elements of a prima facie case but also the presence of discriminatory intent. The author of the majority opinion admittedly based her theory on the premise that unless specifically related to "food and beverage service or safety duties," airline standards applicable to female flight attendants amount to little more than "occupational cliches" which are categorically unjust, harmful, and embarrassing to the women involved. Under the rule announced by the majority, such standards constitute intentional sex discrimination unless the airline-employer can prove that persons failing to meet the standards "would be less able to perform their duties" (as narrowly defined by the Court).

This expansive ruling is particularly appropriate for Supreme Court review because it directly conflicts with Title VII rulings of other circuits and ignores the proof standards recognized by this Court.

STATUTORY PROVISION INVOLVED.

Section 703(a) of Title VII provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . ."

STATEMENT OF CASE.

A. Respondent's Complaint.

Respondent Carole A. Gerdom filed her original Complaint on March 25, 1972 against Continental and her Union alleging discrimination against female flight attendants on the basis of sex in violation of Title VII of the Civil Rights

Act of 1964 as amended, 42 U.S.C. Section 2000(e), *et seq.* General federal question jurisdiction of the District Court was also invoked under 28 U.S.C. Section 1331. The Complaint alleged that Continental's weight standards for flight attendants were discriminatory. Gerdom, the sole named plaintiff, purported to bring a class action on behalf of all flight attendants suspended or terminated for failing to meet Continental's weight standards. The Court dismissed the suit against the Union in 1973; the Union subsequently filed suit against Continental and the suits against Continental were consolidated.

B. Statement of Facts.

1. Parties.

Respondent Carole A. Gerdom was employed as a flight attendant by Petitioner Continental from 1961 until 1971 when she was forced to resign because she had exceeded her maximum weight under Continental's weight standards for 90 days. During her employment Ms. Gerdom was suspended eight times for exceeding the weight limitations.

Defendant/Petitioner Continental is a corporation and a commercial airline carrier.

Respondent Union of Flight Attendants, Local No. 1 is a union.

2. The Job of the Flight Attendant.

Customer service is the basic duty of the flight attendant. More than any other Continental employees, flight attendants are in close contact with passengers. For that reason, their appearance, like their manner of service, creates an impression with the flying public that reflects upon the entire airline. Historically, flight attendant positions were filled by women. Since November, 1972, men and women have served as Continental flight attendants.

3. Continental's Weight and Appearance Standards.

a. *Standards Applicable to Flight Attendants.*

From the time that Continental first instituted flight services in 1934, it has maintained some form of weight and appearance standards for flight attendants so as to present a favorable image to the traveling public. Beginning in 1963, Continental published written weight standards when the Union and the flight attendants urged greater consistency in administering the program. Between December, 1963 and continuing until 1973, written limitations were in effect for all flight attendants in accordance with a published height/weight chart. Any flight attendant whose weight exceeded the maximum was placed on a weight reduction program. Any flight attendant who failed to meet the scheduled loss was subject to discipline. On an average annual basis, less than 2% of the flight attendants on the seniority list were disciplined as a result of Continental's weight and appearance standards.

b. *Standards Applicable to Other Flight Personnel.*

Continental established weight and appearance standards for all of its flight personnel. Pilots, for example, are required to be "business-like" in appearance and follow detailed specifications as to grooming, hair and uniforms.

In addition to pilots and flight attendants, a Director of Passenger Service ("DPS") was assigned to Continental's major and highly competitive flights to function as the in-flight supervisor of flight attendants and to sell tickets. A DPS was selected from Continental's managerial employee group and generally advanced to other managerial positions after service as a DPS. Each DPS was subject to a quarterly weight check and placed on a weight reduction program

whenever the allowable weight was exceeded. A DPS who failed to meet weight requirements after 90 days was subject to reassignment.

C. Proceedings Below and Opinons of the Appellate Court.

On September 11, 1974, the District Court granted partial summary judgment as to liability in favor of plaintiffs on the single ground that Continental's weight limitation standard violated Title VII because it applied only to women prior to 1972. In its "Findings of Fact and Conclusions of Law" the District Court found that since there were few male flight attendants after 1972 the standards had a "disproportionate" impact on women. The Court neither discussed nor made a finding of disparate treatment or discriminatory intent.

In June, 1978, Continental moved for reconsideration of the District Court's partial summary judgment based on Title VII cases decided in the interim. The motion challenged the "adverse disproportionate impact theory" on which summary judgment was based.

On November 27, 1978, the District Court granted Continental's motion and vacated the 1974 order of partial summary judgment in favor of plaintiffs, denied class certification, and entered a judgment of dismissal for Continental on the ground that Title VII was not applicable to plaintiffs' disparate impact theory of discrimination because (a) prior to 1972 men were not involved in the effects of the flight attendant weight policy, and (b) after 1972 when men and women occupied the position of flight attendant, there was no contention that the weight standards were discriminatorily applied. The Court reasoned as follows:

> An employment policy such as the one at bar which includes grooming standards is related more closely to

> the employer's legitimate discretion regarding how he wishes to operate his business than to equality of employment opportunity.

Appendix C, p. 50.

Plaintiffs appealed from the District Court's judgment and on June 22, 1982, a three-judge panel of the Court of Appeals for the Ninth Circuit stated that because Continental's weight requirements were not enforced more strictly against women flight attendants than men flight attendants and did not exclude women as a class from employment as flight attendants the weight requirements had no adverse impact on women. However, the panel reversed the District Court's order granting summary judgment for Continental and remanded to give plaintiffs an opportunity at trial to establish a Title VII violation on a disparate treatment theory (comparing the requirements imposed on the predominantly female flight attendants with those applicable to predominantly male occupations such as DPS) and to permit Continental to advance its business reasons for having weight requirements for the job in question. The Court of Appeals also ordered certification of a class of flight attendants.

In her dissent, Judge Schroeder stated that in light of the "long history of sex discrimination by . . . airlines generally" she would remand with instructions to enter judgment in favor of plaintiffs on the theory that discrimination was demonstrated because Continental "applies a rule only to other employees"; and "[t]he weight restrictions enforced here were not reasonably necessary to performance of the duties of flight attendants." Appendix B, pp. 40-42. For purposes of her analysis, the only such duties recognized by Judge Schroeder were those associated with meal service or safety. Judge Schroeder flatly rejected any flight attendant

functions associated with public relations or Continental's business image as prohibited "sexual stereotyping."

On August 15, 1981, plaintiffs petitioned the Court of Appeals for rehearing *en banc* arguing that it should take a "broad approach" to the definition of equal employment opportunity and find discrimination in the fact pattern presented even though such a finding is not "already clearly endorsed by the Supreme Court." The petition urged adoption of the "distinct theory of discrimination" advanced by Judge Schroeder's dissent. Petition for Rehearing, pp. 10-11.

On November 15, 1982, the Court of Appeals for the Ninth Circuit, in a six to five *en banc* decision, reconsidered the panel opinion and held that trial was unnecessary and that the plaintiff class was entitled to judgment on a disparate treatment theory because Continental's adoption of weight standards applicable to the all female flight attendant occupation constituted intentional discriminatory treatment on the basis of sex. Judge Schroeder wrote the majority opinion, basing it on the theory announced in her dissent to the prior panel opinion. The case was remanded solely for consideration of appropriate class relief.

REASONS FOR GRANTING THE WRIT.

I.

THE COURT OF APPEALS HAS FORMULATED A TITLE VII THEORY OF DISPARATE TREATMENT WHICH CONFLICTS WITH THE RULINGS OF THE SUPREME COURT.

A. The Court of Appeals Has Erroneously Ruled That a Prima Facie Showing of Disparate Treatment May Be Based *Solely* on the Application of a Policy to an All Female Occupation.

Ten years have passed since this Court made clear that the complainant in a Title VII action must carry the initial burden under the statute of establishing a prima facie showing of intentional discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). While the specific prima facie showing will vary in different Title VII factual situations, 411 U.S. 792, 802 n.13, it is the plaintiff's burden to eliminate

> the most common nondiscriminatory reasons for the plaintiff's rejection . . . Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

In this Petition the Court is asked to determine whether the Court of Appeals' formulation of a prima facie case misconstrues the nature of the burden that cases such as *McDonnell Douglas Corp.* and *Burdine* place on a plaintiff.

Having complained in her dissent to the Court of Appeals' panel opinion that "discrimination in segregated job classifications [is] needlessly burdensome to prove," Appendix B, p. 38, Judge Schroeder seized the opportunity as author of the *en banc* opinion to advance the following standard

against which to judge an employee's prima facie showing of discrimination:

> Where a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender, [the Ninth Circuit] has held that the plaintiff need not otherwise establish the presence of discriminatory intent. It is not necessary to establish that there were male employees similarly situated in order to establish a prima facie case.
>
> * * *
>
> Continental's . . . [weight maintenance] policy itself supplies the requisite elements of a prima facie case. . . .

En Banc Court of Appeals Decision, Appendix A, pp. 11-12 (citations omitted).

This theory of discrimination advanced by the Court of Appeals was summarized by its author as follows:

> I would hold that whenever an employer applies a rule only to employees in a sex-segregated job classification and not to other employees, a prima facie case of discrimination has been shown.

Panel Court of Appeals Decision, Appendix B, p. 42.

Although the Court of Appeals reports in its opinion that the above analysis is based on the disparate treatment theory of discrimination announced in *McDonnell Douglas Corp. v. Green, supra*, and clarified in such cases as *Texas Dept. of Community Affairs v. Burdine, supra*, Appendix A, p. 10, even plaintiffs acknowledge that the "distinct" standard adopted by the majority has never before been "endorsed" by any decision of the Supreme Court. Plaintiffs' Petition For Rehearing, p. 10.

The Court of Appeals erroneously relied on nothing but its own recent decisions to conclude that a weight maintenance policy which both the district and appellate courts

agreed favored no male employees and thus had no disparate impact, itself satisfied plaintiffs' necessary prima facie showing merely because it applied to an all-female occupation.

As noted in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), "[d]iscriminatory preference for any group . . . is precisely and only what Congress has proscribed." Despite that, no unlawful preference need be shown or even considered under the majority ruling of the Court of Appeals. The Court of Appeals abused its authority by ignoring the Title VII standards recognized by the Supreme Court and inventing its own.

B. The Court of Appeals Improperly Interpreted *Gunther* to Sanction a Finding That Women Employees in An All-Female Job Classification Were Subject to Disparate Treatment Without the Need to Establish That Such Employees Were Treated Less Favorably Than Similarly Situated Male Employees.

In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court held that Title VII's prohibition of sex-based wage discrimination was not restricted to claims of equal pay for equal work. In deciding that "narrow question" the Court emphasized that it was not identifying "standards for the further conduct" of such litigation, nor was it deciding "whether respondents have stated a prima facie case of sex discrimination under Title VII. . . ." 452 U.S. 161, 166 n. 8. The Supreme Court thus made clear that *Gunther* should not be interpreted as establishing proof standards governing litigation of Title VII sex discrimination claims.

Despite the Supreme Court's own acknowledgment of the narrow limits of its holding, the Court of Appeals erro-

neously relied on *Gunther* to hold that plaintiffs may demonstrate the discriminatory nature of Continental's "burdensome" weight standards without proving or even alleging "that men exempt from these rules performed the same services." Appendix A, p. 10. The Court of Appeals took *Gunther* yet a step further in ruling:

> It is not necessary to establish that there were male employees similarly situated in order to establish a prima facie case [of sex-based disparate treatment].

En Banc Court of Appeals Decision, Appendix A, p. 11.

This unconventional approach of the Court of Appeals would require no comparison whatever of the relative employment conditions applicable to men and women whenever the claim of sex-based disparate treatment is raised by an incumbent in an all-female occupation. The Court of Appeals' expansive interpretation of *Gunther* should be rejected as flatly inconsistent with the express language of *Gunther* itself and with this Court's rulings that Title VII is violated only when a discriminatory preference is shown.

II.

THE COURT OF APPEALS' REQUIREMENT THAT IN RESPONSE TO A CHARGE OF DISPARATE TREATMENT THE EMPLOYER MAY ONLY JUSTIFY ITS POLICY ON THE BASIS OF IMPROVED JOB PERFORMANCE CONFLICTS WITH *McDONNELL DOUGLAS CORP.* AND *BURDINE.*

If a plaintiff succeeds in proving a prima facie case of disparate treatment, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason . . ." for the conduct in question. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253. The Supreme Court has never suggested that courts may impose prior restraints governing the particular reason which an employer may proffer in responding to a claim of disparate treatment.

Instead, the employer fully satisfies its burden by articulating *any* "legitimate nondiscriminatory" reason for its action. *Burdine, supra*, 450 U.S. 248, 258.

Despite the clear language of *Burdine* the Court of Appeals in this case announced, citing no authority whatever, that the *only* "defensible" reasons which Continental would be permitted to advance would be

> that persons of either sex who exceed the weight limits imposed on these flight hostesses would be less able to perform their duties[3] [or]
>
> * * *
>
> that being a thin female was a bona fide occupational qualification for serving passengers on airplanes.

En Banc Court of Appeals Decision, Appendix A, p. 12 (emphasis added).

Finding no evidence that either justification had been established by Continental in connection with the summary judgment proceeding, the Court of Appeals ruled against giving Continental the opportunity to do so at trial, citing its own Catch-22 authority that,

> [w]here as here an employer *cannot* state a legitimate nondiscriminatory reason to rebut a plaintiff's prima facie case, a reviewing court may conclude, as we do in this case, that discrimination has been established as a matter of law, based on the plaintiff's initial showing.

En Banc Court of Appeals Decision, Appendix A, p. 13 (emphasis added).

Nothing in the language of *Burdine* or its progeny authorizes the Court of Appeals to dictate, in the absence of

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[3]For purposes of this analysis the only flight attendant job duties regarded as legitimate by the Court are those associated with meal service or safety.

any evidence on the point, what the Court perceives to be the best or most "defensible" business reasons for the employer's conduct. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978) reversed a Court of Appeals ruling which purported to do just that, stating:

> Courts are generally less competent than employers to restructure business practices and unless mandated to do so by Congress they should not attempt it.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 578.

By mandating an immediate showing of improved job performance and refusing to accept or even consider any business purpose unless narrowly related to a flight attendant's meal service and safety functions, the author of the majority *en banc* opinion delimited and pre-judged Continental's substantive defense and in so doing totally ignored the central holdings of *Burdine* and *Furnco*.

III.

THE COURT OF APPEALS' DECISION THAT DISPARATE TREATMENT ON THE BASIS OF SEX MAY BE SHOWN WHEN THE EMPLOYMENT PRACTICE AFFECTED ONLY WOMEN BY FAVORING CERTAIN WOMEN OVER OTHER WOMEN IS IN DIRECT CONFLICT WITH THE VIEWS OF THE FIRST AND FIFTH CIRCUITS.

Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir. 1977), *cert. denied* 434 U.S. 844 (1977), the first of an important line of Fifth Circuit cases, held that where only women sought and held the position of flight attendant, a no-marriage rule of the employer did not discriminate on the basis of sex:

> [C]ertain women—stewardesses who are unmarried—are favored over certain other women—stewardesses who are married . . . Men were not favored over women; they simply were not involved in the functioning of the policy.

Stroud v. Delta Air Lines, Inc., 544 F.2d 892, 893.

The Fifth Circuit's rationale reflects "the necessity of indicating some dissimilarity in treatment between the sexes before an allegation of sex discrimination can be upheld." 544 F.2d 892, 894. Given the all-female composition of Continental's flight attendant corps until 1972, plaintiff's termination cannot be shown to differentiate on the basis of sex between similarly situated males and females. *Stroud v. Delta Air Lines, Inc., supra,* 544 F.2d at 893-94.

In *Costa v. Markey*, 677 F.2d 158, 160 (1st Cir. 1982), *recons. and rev'd on other grounds*,[4] ___ F.2d ___, 30 FEP Cases 593 (1st Cir. 1982) the First Circuit adopted the reasoning of *Stroud* and held that imposition of a minimum height requirement on an all-woman pool of applicants did not violate Title VII.

The District Court in this case also followed *Stroud* in granting Continental's motion for summary judgment on the basis that any discrimination suffered by the plaintiffs who failed to meet Continental's weight standard was "based upon weight and not upon sex. . . ." which is not barred by Title VII. Appendix C, p. 49.

In a holding which conflicts with the views of the Fifth and First Circuit courts, the Seventh Circuit in *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), rejected a rule applicable solely to an all-woman occupation as unlawful under Title VII. The Seventh Circuit viewed the "class" of United's employees as a whole and concluded

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[4]On reconsideration in light of *Connecticut v. Teal*, ___U.S. ___, 102 S.Ct. 2525 (1982), the First Circuit found a violation on a disparate impact theory because the challenged height requirement was uniformly applied to men and women applicants and excluded more women than men. Continental's policy, by contrast, was found to have no disparate impact because it applied only to women during the relevant time period.

that United contravened Title VII by applying one standard for men and one for women. The Seventh Circuit expressed its disagreement with *Stroud* on the basis that "[c]onsiderations of the peculiar characteristics of the position only pertain to the claim of a bona fide occupational qualification. . . ." 444 F.2d 1194, 1198.

The Court of Appeals in this case similarly rejected the reasoning of not only the District Court but the Fifth and First Circuits although it extended the rationale adopted by the Seventh Circuit in *Sprogis*. The Ninth Circuit held that a policy which applies only to a single-sex employee group itself supplies the requisite elements of a prima facie case of disparate treatment. Under this approach, and unlike even *Sprogis*, no consideration of the weight standard which plaintiffs concede are applicable to Continental's Directors of Passenger Service, for example, is required to establish a presumption of intentional sex discrimination.

If allowed to stand, the theory of discrimination created by the Ninth and Seventh Circuits would preclude enforcement of a standard applicable only to a single-sex group simply because no members of the opposite sex were subject to the identical standard.

IV.

THE COURT OF APPEALS' INDEPENDENT FINDING OF INTENT, A FACTUAL QUESTION NEVER ADDRESSED BY THE DISTRICT COURT, IS IMPROPER UNDER RULE 56.

Proof of discriminatory motive required for a finding of discriminatory treatment in violation of Title VII is highly dependent upon judgments of credibility and sincerity. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977). Consequently, summary judgment under Rule 56 is generally disapproved where, as here, intent is the ultimate issue to be resolved. *Poller*

v. Columbia Broadcasting System, 368 U.S. 464 (1962), cf. *Pullman-Standard v. Swint*, ___ U.S. ___, 102 S.Ct. 1781 (1982).

The *en banc* ruling of the Court of Appeals ignored these well-established principles when the majority vacated the District Court's judgment of dismissal, reversed the Court of Appeals' order for a remand on the question of intent and improperly made its own finding of discriminatory intent, the ultimate issue in this case.

Plaintiffs acknowledge that the District Court never addressed the question of disparate treatment and made no findings whatever on "the question of Continental's intent." Appellant's Opening Brief, pp. 66-67. Conceding that the question of intent "is not suitable for resolution through summary judgment," plaintiffs themselves requested "at a minimum" that the matter be remanded by the Court of Appeals for a trial on the merits. *Id.* at 67.

The Court of Appeals initially granted plaintiffs' request and remanded to the District Court for consideration of plaintiffs' disparate treatment theory, specifically instructing it to consider Continental's reasons for imposing weight requirements "in order to determine whether the plaintiffs have shown intentional discrimination." Appendix B, p. 37.[5]

On reconsideration *en banc*, the majority erred in independently evaluating the limited evidence before it and giving plaintiffs more than even they asked for — the benefit of summary judgment without first having had to prove their facts at trial. The majority's finding that Continental's conduct was motivated by a discriminatory purpose was

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[5]Judge Schroeder, the single dissenting Judge, stated she would have remanded with instructions to enter judgment for plaintiffs. She subsequently had the opportunity to do so as author of the *en banc* opinion.

prefaced with a lengthy discussion of the "long history" of discriminatory airline policies which, according to certain law journal articles cited by Judge Schroeder in her dissenting opinion, were designed to insure that passengers were served by women who were "young, nubile, fashionably thin, and single." The majority ruled in light of its reading of airline history (which was never an issue in this case and which Continental never had an opportunity to refute), that Continental's discriminatory intent was established based solely on what the appellate court described as a "facial examination" of Continental's weight standards and the observation that for a time the flight attendant standards applied only to women. Without ever tracing the weight standards to evidence of a discriminatory purpose or examining the weight standards in effect for the predominantly male DPS position, the majority drew the simple conclusion that the policy "on its face applies less favorably to one gender," and held "the plaintiff need not otherwise establish the presence of discriminatory intent." Appendix A, p. 11.

On this meager record, the Court of Appeals should not have made its own factual determination of the ultimate Title VII issue of an employer's motives. That issue was not previously raised before the District Court and Continental never had an opportunity to develop a full factual record to dispute or even address an unprecedented theory of discrimination which was considered for the first time on appeal. However eager certain of its members may be to pass judgment on any airline policy which they conceive applies only to women, the Court of Appeals should not be relieved of the requirement under Rule 56 and the decisions of this Court of remanding for further proceedings to the tribunal charged with the task of fact finding in the first instance.

CONCLUSION.

For the above reasons, petitioner respectfully submits that a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A.

Opinion.

In the United States Court of Appeals for the Ninth Circuit.

Carole A. Gerdom, Plaintiff-Appellant, v. Continental Airlines, Inc., Defendant-Appellee.

Union of Flight Attendants, Local No. 1, Plaintiff-Appellant, v. Continental Airlines, Inc., Defendant-Appellee.

No. 79-3215. D.C. Nos. 72-663-JWC & 73-2503-JWC.

Filed: November 15, 1982.

Appeal from the United States District Court for the Central District of California. Jesse W. Curtis, District Judge, Presiding. Argued and submitted June 15, 1982.

Before: BROWNING, Chief Judge, CHOY, GOODWIN, WALLACE, KENNEDY, SKOPIL, SCHROEDER, FARRIS, PREGERSON, ALARCON, and BOOCHEVER, Circuit Judges.

SCHROEDER, Circuit Judge.

This appeal concerns the validity of a policy requiring employees classified as "flight hostesses," a position held only by women, to comply with strict weight requirements as a condition of their employment with Continental Airlines. The challenged weight program was in effect until 1973 and was imposed, according to Continental, to enhance its business image by assuring that passengers were served by attractive women. No similar requirements were enforced for any job classifications which included men.

The plaintiff, Carole A. Gerdom, whose record was otherwise exemplary, was suspended and eventually terminated from her flight hostess position because her weight exceeded the maximum permitted by Continental for her height. She filed this action seeking to represent a class of hostesses

who were similarly suspended or terminated as a result of Continental's policy. She challenges the policy as unlawful discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000(e) *et seq.*[1] The original panel decision of this court reversed the district court's order granting summary judgment for Continental, ordered certification of plaintiff's class, and remanded for trial on the merits. *See Gerdom v. Continental Airlines, Inc.*, 648 F.2d 1223 (9th Cir. 1981). We granted plaintiff's petition for en banc consideration in order to determine whether the plaintiff class is entitled to judgment on the issue of liability. We now hold that it is.

FACTS AND PROCEDURAL HISTORY

The essential facts surrounding Continental's policy and its implementation are not disputed. Beginning in the early 1960's and continuing until 1973, weight regulations were in force for flight hostesses in accordance with a published chart based upon height and weight. A hostess five feet two inches tall could weigh no more than 114 pounds; five additional pounds were allowed for each inch above that height. All hostesses were weighed once a month in full uniform including shoes. If this procedure revealed any excess, a weight reduction program was imposed. The hostess was required to lose two pounds per week and her progress was verified. If she failed to meet the scheduled loss, the hostess was suspended and eventually terminated. The weight requirements were in addition to general appearance standards. During the period covered by this appeal, more than 100 hostesses were suspended and some, including the plaintiff Gerdom, were actually terminated.

The purpose of the weight program was, according to Continental, to create the public image of an airline which offered passengers service by thin, attractive women, whom

executives referred to as Continental's "girls." Continental has never suggested that these weight limitations were necessary for the physical performance of plaintiffs' food and beverage service or safety duties on flights. The record also shows that the weight program was unrelated to health concerns; indeed there is considerable evidence that it undermined the hostesses' stamina and morale, and encouraged harmful methods of weight reduction. During the same period Continental enforced no similar weight program for an exclusively male category of employees, known as directors of passenger service (DPS), who supervised and assisted the flight hostesses in their duties on busy routes, helped with ticketing, and who, although receiving higher pay than the hostesses, performed similar tasks.

The weight program challenged here was modified in 1973 in the wake of the determination that airline companies could not maintain in-flight service personnel classifications based on gender. *See Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950, 92 S. Ct. 275, 30 L. Ed. 2d 267 (1971). Although the trial court proceedings in this case encompassed weight policies adopted by Continental after it hired increased numbers of male flight attendants, we consider in this appeal only those policies which were in effect before the 1973 modifications and at the time this lawsuit was filed.

This litigation has an unusual history. The case was initially assigned to Judge Crary when it was filed in 1972. He granted partial summary judgment to the plaintiff on the ground that the policy violated Title VII because it applied only to women. Following that 1974 decision, the court monitored the weight policies which Continental then applied to male and female flight attendants. In 1978, however, Judge Crary died and the case was transferred to Judge Curtis, who granted reconsideration of the partial summary

judgment previously awarded to plaintiffs and entered judgment for the defendants.

On appeal, the three-judge panel of this court reversed the district court's order denying class certification. A majority, however, held that the plaintiffs could not argue that the policy had an adverse impact on women under the analysis used in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) and *Dothard v. Rawlinson*, 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977). The panel majority reasoned that because only women were hired for the position of flight hostess during the applicable period, plaintiffs were required to proceed under a theory of disparate treatment.[2] The majority held that the plaintiffs could show that they had been treated discriminatorily due to their sex if, upon remand, they could establish that men similarly situated had not been subjected to comparable burdens. The panel thus remanded to determine whether "the different rules for flight attendants and DPSs violate Title VII." 648 F.2d at 1228.

We conclude that no such remand is necessary because the plaintiffs have adequately demonstrated that they were treated less favorably than men because of their sex. We therefore do not reach the applicability of disparate impact analysis to employment conditions imposed exclusively on a job classification restricted by race, religion, sex or national origin.

LEGAL ANALYSIS

The legal question is whether Continental's weight program for exclusively female flight attendants constitutes discriminatory treatment on the basis of sex as proscribed by Title VII. Plaintiffs stress that the program was intentionally designed to apply only to women employees. It resulted in a loss of wages and employment only for women

employees and it was never applied to male employees, even those who worked side by side with plaintiffs serving passengers on flights.

Continental advances three reasons why plaintiffs should not be able to maintain this action for discriminatory treatment on the basis of sex. It argues first that employment standards which affect personal appearance are outside the purview of Title VII and, as a matter of law, cannot be discriminatory. Second, it argues that these employees cannot complain of discrimination because the flight hostess position was a popular one, sought by many women and denied to men, and therefore the only victims of discrimination were men. Finally, Continental argues that the weight program, even if facially discriminatory, can be justified by its judgment that female hostesses were central to its business image. We deal with each argument in turn.

In arguing that the weight restrictions in this case are simply a "grooming" requirement outside the purview of Title VII, Continental relies on a series of cases sanctioning different grooming standards for men and women where the requirements imposed no greater burden on one sex than on the other. Thus in *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046, 95 S. Ct. 2664, 45 L. Ed. 2d 699 (1975), this court upheld a policy which prescribed a shorter hair length for men than for women. The record in that case permitted the trial court to conclude that comparable grooming standards existed and were enforced with equal vigor on both sexes. *See Baker v. California Land Title Co.*, 349 F. Supp. 235, 237, 239 (C.D. Cal. 1972), *aff'd* 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046, 95 S. Ct. 2664, 45 L. Ed. 2d 699 (1975). *See also Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 756 (9th Cir. 1977) (employer may amend the rules for male or female employees to prevent them from becom-

ing overly burdensome to that sex). We thus agree with the numerous decisions defining permissible grooming rules for male and female employees as those which do not significantly deprive either sex of employment opportunities, and which are even-handedly applied to employees of both sexes. *See Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1350 (4th Cir. 1976); *Knott v. Missouri Pacific Railroad Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 457 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086, 98 S. Ct. 1281, 55 L. Ed. 2d 792 (1978); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973). Several courts have similarly upheld physiologically based policies which set a higher maximum weight for men than for women of the same height. *See e.g., Jarrell v. Eastern Air Lines, Inc.*, 430 F. Supp. 884, 893 (E.D. Va. 1977), *aff'd per curiam*, 577 F.2d 869 (4th Cir. 1978); *Leonard v. National Airlines, Inc.*, 434 F. Supp. 269, 272-73 (S.D. Fla. 1977); *Comstock v. Eastern Air Lines, Inc.*, 10 Empl. Prac. Dec. (CCH) ¶ 10,392 (E.D. Va. 1975). In those cases, unlike this case, no significantly greater burden of compliance was imposed on either sex; that is the key consideration. *See Laffey v. Northwest Airlines, Inc.*, 567 F.2d at 457, (an employer's preference for "trimness" may be effectuated only where males and females are treated equally); *accord ALPA v. United Airlines, Inc.*, 21 Empl. Prac. Dec. (CCH) ¶ 30,419 (E.D.N.Y. 1979).

Thus Title VII has been held to have been violated where special appearance rules were imposed on members of only one sex. *Carroll v. Talman Federal Sav. & Loan Ass'n*, 604 F.2d 1028, 1032-33 (7th Cir. 1979), *cert. denied*, 445 U.S. 929, 100 S. Ct. 1316, 63 L. Ed. 2d 762 (1980). In *Carroll*, which involved a requirement to wear uniforms,

the court noted that while there is nothing offensive about uniforms *per se*, requiring only female employees to wear them is "disparate treatment . . . demeaning to women . . . based on offensive stereotypes prohibited by Title VII." *Id.*

The same rationale has been applied by the Sixth Circuit in holding that abandonment of an unmarried name in favor of a spouse's surname cannot be made the subject of a rule applied only to females. *Allen v. Lovejoy*, 553 F.2d 522, 524 (6th Cir. 1977). "A rule which applies only to women, with no counterpart applicable to men, may not be the basis for depriving a female employee who is otherwise qualified of her right to continued employment." *Id.* The court there distinguished cases in which grooming requirements for one gender coexisted with comparable requirements for the other. *Id.*

We therefore conclude that Continental cannot avoid Title VII scrutiny of its weight program for flight hostesses on the theory that its subject matter is outside the scope of the statute.

Continental's next argument is that its policy cannot unlawfully discriminate against women because it applies to a glamorous position which many, including men, sought. That argument is also without support.

Early decisions considering the pervasiveness of gender-based discrimination in the airline industry struck down all-female employment categories, like Continental's flight hostess classification, because they discriminated against men. *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950, 92 S. Ct. 275, 30 L. Ed. 2d 267 (1971); *Hailes v. United Airlines*, 464 F.2d 1006 (5th Cir. 1972); Decision No. 70-37, EEOC Dec. (CCH 1973) ¶ 6051 (1969); Decision No. 70-89, EEOC

Dec. (CCH 1973) ¶ 6063 (1969). It does not follow, however, that only those denied work, or those in menial and undesirable positions may complain of discrimination in policies applicable to segregated classifications. The exclusively female classification in this case typifies the then prevailing pattern in the airline industry of restricting job opportunities and imposing special conditions on the basis of gender stereotypes.

These practices have not survived judicial scrutiny. Thus airlines can no longer prevent all but young, single women from working as cabin attendants. *See generally Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 371 (4th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 965, 101 S. Ct. 1480, 67 L. Ed. 2d 613 (1981); *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142, 1145 (7th Cir. 1978), *cert. granted sub nom., TWA v. Zipes*, 450 U.S. 979, 101 S. Ct. 1511, 67 L. Ed. 2d 813 (1981) ("no motherhood" policy for female flight attendants constitutes sex discrimination); *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991, 92 S. Ct. 536, 30 L. Ed. 2d 543 (1971) (prohibiting women flight attendants from marrying held discriminatory), *see also Dodd v. American Airlines, Inc.*, EEOC Dec. (CCH 1973) ¶ 6001 (1968) (condemning mandatory retirement at age 33 or 35 as "part and parcel" of the airline's sex discrimination policies). This circuit has held that flight attendants who were the victims of similar practices are entitled to reinstatement and to damages. *Sangster v. United Airlines, Inc.*, 633 F.2d 864 (9th Cir. 1980), *cert. denied*, 451 U.S. 971, 101 S. Ct. 1766, 68 L. Ed. 2d 243 (1981); *Inda v. United Airlines, Inc.*, 565 F.2d 554 (9th Cir. 1977).

The harmful effects of occupational cliches were addressed recently by the Supreme Court in *Mississippi University for Women v. Hogan*, 50 U.S.L.W. 5068 (U.S. July

1, 1982), a suit by a male R.N. to gain admission to an all-female nursing school. In that case Justice O'Connor's opinion for the Court cautioned against permitting gender-based classifications based on stereotypical notions of the roles of men and women. Her discussion highlighted the history of women's exclusion from a wide spectrum of employment opportunities ranging from admission to the legal profession to bartending. *Id.* at 5070 n.10. Justice O'Connor also noted that, while denying entry to men helped to maintain a female monopoly in nursing, it served to perpetuate the stereotypical view of nursing as women's work, which, far from serving to benefit women professionally, is thought to have depressed nursing wages. *Id.* at 5071 n.15. Continental's argument that women have been the beneficiaries of its policy of gender-based job segregation thus lacks support both in law and history.

Continental also relies upon *Stroud v. Delta Airlines, Inc.*, 544 F.2d 892 (5th Cir.), *cert. denied*, 434 U.S. 844, 98 S. Ct. 146, 54 L. Ed. 2d 110 (1977), for its position that by hiring only women as flight attendants it has immunized itself against claims of discriminatory treatment by those employees. The court in *Stroud*, considering a no-marriage rule, reasoned that policies applied solely to exclusively female flight attendants discriminated not on the basis of gender, but of job classification. *Id.* at 893. Because no men had the same duties as the stewardesses, the women could not complain that the no-marriage rule applied solely to them.

The Supreme Court's decision in *County of Washington v. Gunther*, 452 U.S. 161, 101 S. Ct. 2242 (1981), rejects that narrow reasoning. In *Gunther*, affirming the decision of this court, the Supreme Court held that discrimination in compensation could be shown without proof that plaintiffs' jobs were equal to higher-paying jobs held by the

opposite sex. *Id.* at 178-80, 101 S. Ct. at 2252-53. Thus in demonstrating that the burdensome regulations imposed on an all-female job category were discriminatory, plaintiffs here need not prove that men exempt from these rules performed the same services. Such a rule improperly limits the scope of Title VII. "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 180, 101 S. Ct. at 2253.[3] The statute is not limited in its protection to those job classifications which include both genders. *See Id.* at 178-79, 101 S. Ct. at 2252-53.

We turn finally to the merits of the claim that Continental's weight program unlawfully discriminated against women flight attendants, and to Continental's defense of the policy as a competitive measure.

In proving disparate treatment, the plaintiff has the initial burden of producing sufficient evidence of discriminatory treatment, a burden which is not onerous. The burden of production then shifts to the defendant to put forward a neutral, non-discriminatory justification for the treatment. The plaintiff must then have the opportunity to show that the justification is mere pretext. The burden of persuasion with respect to intent remains with plaintiff at all times. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093-94 (1981); *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 575-78, 98 S. Ct. 2943, 2948-50 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25 (1973); *Hagans v. Andrus*, 651 F.2d 622, 624-25 (9th Cir.), *cert. denied sub nom. Hagans v. Watt*, ___ U.S. ___, 102 S. Ct. 313 (1981); *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1341 (9th Cir. 1981), *cert. denied*, 51 U.S.L.W. 3254 (U.S. Oct. 4, 1982).

The *McDonnell Douglas-Burdine* analysis was originally formulated in cases of claimed discrimination in individual hiring or promotion decisions which were not facially based upon gender, race or other suspect criteria. The purpose of this order of proof is to isolate improper motive. *Furnco Const. Corp. v. Waters*, 438 U.S. at 577, 98 S. Ct. at 2949-50. In some cases, facially different treatment itself implies intent. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 1854 n.15 (1977). The general principle is that the plaintiff has the initial burden of offering evidence which is sufficient to create an inference of intentional discrimination. *Id.* at 358 & n.44, 97 S. Ct. at 1866 & n.44.

A facial examination of the weight program here reveals that it is designed to apply only to females. Where a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender, this court has held that the plaintiff need not otherwise establish the presence of discriminatory intent. *Norris v. Arizona Governing Committee*, 671 F.2d 330, 333 (9th Cir.), *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 12, 1982) (No. 82-52); *Douglas v. Anderson*, 656 F.2d 528, 531 n.2 (9th Cir. 1981). It is not necessary to establish that there were male employees similarly situated in order to establish a prima facie case.

The fact that this policy applied to an intentionally all-female job classification does not alter the analysis or make the policy less facially discriminatory. By Continental's own admission, the policy was enforced only against women because it was not merely slenderness, but slenderness of female employees which Continental considered critical. *See also* the discussion in *EEOC v. Sage Realty Corp.*, 24 Fair Empl. Prac. Cas. (BNA) 1521, 1528 (S.D.N.Y. 1981) (involving a requirement that exclusively female lobby host-

esses wear revealing uniforms, held to be prima facie discrimination).

Because Continental's facially discriminatory policy itself supplies the requisite elements of a prima facie case, we must look to Continental's efforts to rebut it.

A prima facie showing of discrimination is rebutted by raising a genuine issue of fact as to the existence of a legitimate nondiscriminatory reason for the challenged practice. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S. Ct. 1089, 1094 (1981). In this case that would entail a showing that persons of either sex who exceed the weight limits imposed on these flight hostesses would be less able to perform their duties. Continental, however, has never attempted to assert such a justification. It concedes that the weight program did not improve the ability of attendants to perform their duties.

The only justification that has been advanced for the weight program is Continental's desire to compete by featuring attractive female cabin attendants. Subsumed in its assertion is the view that, to be attractive, a female may not exceed a fixed weight. Continental has never argued that all people, regardless of gender, are unattractive if they exceed fixed weight criteria. Nor has it suggested that the same competitive image would have been served by hiring thin males as well as females.

The difficulty with the justification, therefore, is that it is not neutral. It is discriminatory on its face, for it merely declares the company's determination to impose this requirement on employees because they are females. Continental's policy would be defensible if Continental could show that being a thin female was a bona fide occupational qualification for serving passengers on airplanes. 42 U.S.C. § 2000e-2(e) (1976).[4] Continental does not argue that only

thin females can do the job, however. To the extent it suggests a justification based on consumer preference for female hostesses, such a justification must fail. This court has recently held gender-based discrimination cannot be upheld on the basis of customer preferences unrelated to abilities to perform the job. *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981). It has long been established in the airline industry that passengers' preference for attendants who conform to a traditional image cannot justify discriminatory airline hiring policies.

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950, 92 S. Ct. 275, 30 L. Ed. 2d 267 (1971).

Where as here an employer cannot state a legitimate nondiscriminatory reason to rebut a plaintiff's prima facie case, a reviewing court may conclude, as we do in this case, that discrimination has been established as a matter of law, based on the plaintiff's initial showing. *Muntin v. State of Cal. Parks and Recreation Dept.*, 671 F.2d 360, 362 (9th Cir. 1982).

If Continental had tried to assert a nondiscriminatory reason for the weight program, the pretextual or non-pretextual nature of its justification would have to be considered. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253,

101 S. Ct. 1089, 1093 (1981). At this stage in the proof a comparison with employees who are similarly situated would become relevant. *Id.; McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S. Ct. 1817, 1825 (1973); *Piva v. Xerox Corp.*, 654 F.2d 591, 598 (9th Cir. 1981). Unequal treatment of a different class in the same employment context is significant evidence of pretext. B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 314 (Supp. 1979).

The pretextual quality of any justification which could be asserted is demonstrated by the presence of male DPS's on flights. They performed the same physical tasks as flight hostesses but weighed far more, thus belying a contention that people who weigh less perform better. Since both DPS's and hostesses served the flying public, but only hostesses were required to obey weight rules, the airline could not successfully maintain that the image of slimness was the critical factor regardless of gender. A remand to consider such a justification for the weight program would therefore serve no useful purpose.

CONCLUSION

We hold that Continental's policy of requiring an exclusively female category of flight attendants, and no other employees, to adhere to the weight restrictions at issue here constitutes discriminatory treatment on the basis of sex. The class of suspended and terminated flight attendants should be certified, as the panel decision properly held that all of the requisites of Rule 23 are satisfied. 648 F.2d at 1228. That panel opinion is otherwise vacated and the case is remanded to the district court for consideration of appropriate relief.

FOOTNOTES

[1]§ 2000e-2(a) provides that

> [i]t shall be an unlawful employment practice for an employer . . .
>
> to fail or refuse to hire or to discharge, any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ..

42 U.S.C. § 2000e-2 (1976).

[2]In *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977), the Supreme Court distinguished these two theories. *Id.* at 335 n.15, 97 S. Ct. at 1854 n.15. Disparate treatment arises when an

> employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . ..
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . .. Proof of discriminatory motive . . . is not required under a disparate-impact theory.

Id. (citations omitted).

[3]The argument that stewardesses could not complain of discriminatory treatment because there were no better treated males with similar duties was rejected in an early round of EEOC decisions, which stated that "[t]he concept of discrimination based on sex does not require an actual disparity of treatment among male and female employees presently in the same job classification. It is sufficient that a company policy or rule is applied to a class of employees because of their sex, rather than because of the requirements of the job." *Dodd v. American Airlines, Inc.*, EEOC Dec. (CCH 1973) ¶ 6001 (1968); *Neal v. American Airlines*, EEOC Dec. (CCH 1973) ¶ 6002 (1968).

[4]42 U.S.C. § 2000e-2(e) provides:

> Notwithstanding any other provision of this title [42 U.S.C.S. §§ 2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

42 U.S.C. § 2000e-2(e) (1976).

DISSENTING OPINION.

Gerdom v. Continental Airlines, Inc., No. 79-3215.

Filed: November 15, 1982.

FARRIS, Circuit Judge, with whom BROWNING, Chief Judge and CHOY, WALLACE and KENNEDY, Circuit Judges join, dissenting:

I find discrimination no less an evil than does the majority. I believe, however, that making factual determinations at the appellate level may prove a more invidious evil. I therefore respectfully dissent.

Until 1973 Continental Airlines hired only women as flight hostesses and required them to maintain their weight below the maximum set forth in its published height/weight chart. Continental changed its policy of hiring only women as flight attendants after *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388-89 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), held that Pan Am's identical policy violated Title VII. Thereafter, Continental redesignated the position "flight attendant" and began hiring men. In 1973 the height/weight chart was replaced with a "general appearance standard" which required that flight attendants maintain their weight in a "reasonable relationship" to their height, bone structure, and age. Other weight policies were subsequently in effect until 1977 when Continental eliminated all weight requirements.

Carole Gerdom was a flight hostess for Continental from 1961 until 1971. Although her record was otherwise exemplary, she was suspended without pay eight times for exceeding her maximum weight. In March 1971 she was terminated because she had exceeded her maximum weight for ninety days.

In 1972 Gerdom sued Continental and her union, the Air Line Pilots Association, claiming that her termination con-

stituted unlawful sex discrimination in violation of Title VII. Gerdom requested compensatory and punitive damages, injunctive relief, and attorney's fees. She also sought to represent a class of flight hostesses and attendants who had been either suspended or terminated for failing to meet Continental's weight requirement. During the relevant period, at least eight flight attendants were terminated and more than 145 suspended for violating the weight requirement.

The district court denied Gerdom's motion to certify a class of terminated and suspended flight attendants on a theory that the relevant class should not include suspended flight attendants. Because only eight women had been terminated, the numerosity requirement of Fed. R. Civ. P. 23 was not satisfied.

The judge who ultimately decided the case granted Continental's motion for summary judgment. The court rejected Gerdom's argument that the weight requirement had had a disproportionately adverse impact on women because Gerdom did not allege that the requirement had been applied more strictly to female flight attendants than to male flight attendants. The court concluded that Continental had not discriminated on the basis of sex, but rather on the basis of weight, which is not barred by Title VII.

While I agree that Continental's weight requirement did not have an adverse disparate impact on women, I would remand because the district court failed to consider Gerdom's disparate treatment argument. Gerdom had also argued that the weight policy, which applied only to the exclusively female flight hostess position, constituted unlawful disparate treatment because similar, but predominantly male, positions either had no weight requirement or, at most, a more lenient weight requirement. I agree with the majority that we should reverse the denial of class certifi-

cation, but I would remand for trial on the merits. The majority instead resolves the issue and remands only for the award of damages.

ANALYSIS

I. THEORIES AVAILABLE FOR PROVING SEX DISCRIMINATION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides, in relevant part, that it shall be an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

There are two theories available for proving Title VII employment discrimination. The theories involve different burdens of proof and production, and each is best suited for challenging a particular type of employment decision or practice. Sometimes both theories may be applied to the same set of facts. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

In *Teamsters* the Supreme Court distinguished these two theories. Disparate treatment arises when an

> employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is crit-

> ical, although it can in some situations be inferred from the mere fact of differences in treatment . . ..
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . .. Proof of discriminatory motive . . . is not required under a disparate-impact theory.

Id. (citations omitted).

A. DISPARATE IMPACT

The disparate impact theory was first articulated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In order to establish a prima facie case of sex discrimination under this theory, a plaintiff need show only that a facially neutral employment practice produces a significantly adverse impact on one sex. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). Gerdom argues that Continental's weight policy had such an adverse impact on women. I would reject the argument.

Although the weight policy affected more women than men, this effect was not because the policy was directed towards women, but was only the inevitable consequence of the fact that during the period in question all flight hostesses were women. *See Connecticut v. Teal*, ___ U.S. ___, 50 U.S.L.W. 4716, 4719 (June 21, 1982), *citing Dothard*, 433 U.S. at 329-30 & n.12. Because there were no male flight hostesses, any neutral employment practice would necessarily have affected more women than men. For example, if flight hostesses were punished more severely for being late to work, a serious problem since it often would result in missing a flight, the penalty would also have affected more women than men. I do not read Title VII as

going so far as to subject to judicial scrutiny every employment condition or requirement that is applied to a job category in which most of the employees are of one sex. There must be proof that the disproportionately adverse impact on one sex was caused by the challenged employment condition or requirement. *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 800-01 (5th Cir. 1982); *Equal Employment Opportunity Commission v. Greyhound Lines, Inc.*, 635 F.2d 188, 192-93 (3d Cir. 1980). Continental is now hiring more male flight attendants. I would expect that the proportion of flight attendants of either sex affected by the weight requirement would approximate the gender composition of the workforce of flight attendants. If the weight requirement has a greater impact on female flight attendants than on male flight attendants, the disparate impact theory would be appropriate for arguing that the weight requirement violates Title VII.

The Supreme Court's recent decision in *Connecticut v. Teal*, ___ U.S. ___, 50 U.S.L.W. 4716 (June 21, 1982), is not to the contrary. In *Teal* a group of black employees challenged their employer's use of a facially neutral examination which a disproportionate number of blacks failed. The Court rejected the employer's "bottom line" defense that he took corrective measures to insure that the number of blacks promoted reflected their numbers in the community. *Id.* at 4719-20. *Teal* is inapposite because it involved two different racial groups of employees subject to a facially neutral requirement that had a disparate impact on only one of the groups. The two groups present in the facts before this court are not distinguishable under the terms of Title VII. The weight requirement discriminated against one group of women who could not meet Continental's weight requirement and favored a different group of women who could meet the standard.[1] Gerdom did not allege that

the weight requirement selected or rejected applicants or affected working conditions in a male-to-female ratio significantly different from that of the pool of flight hostesses or flight hostess applicants. No comparison can be made between male and female flight attendants because there were no male flight attendants during the period in question. Therefore, the disparate impact theory is not appropriate for analysis of these facts. *See Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-36 (1975); *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 800-01 (5th Cir. 1982); *Equal Employment Opportunity Commission v. Greyhound Lines, Inc.*, 635 F.2d 188, 192-93 (3d Cir. 1980).

I would therefore find that although Gerdom failed to establish her claim under the disparate impact theory, she might still be able to do so under the disparate treatment theory.

B. DISPARATE TREATMENT

The disparate treatment theory was first articulated by the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). This mode of analysis is appropriate when an employer treats persons of one sex differently from similarly situated persons of the other sex on account of their sex. In contrast to a disparate impact case, discriminatory intent must be proven in a disparate treatment case. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

The Supreme Court has recently reiterated the allocation of the shifting burdens of proof and production in a disparate treatment case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). In order to establish a claim of disparate treatment in employment under Title VII, a plaintiff has the initial burden of proving by a pre-

ponderance of the evidence a prima facie case of discrimination. *Id.* at 252-53. The burden is not onerous. *Id.* at 253.

Gerdom argued that Continental's weight requirement constituted unlawful disparate treatment because it was imposed on the exclusively female flight hostess position, while similar job positions, predominantly male, were not subject to a weight requirement, or at most, to a more lenient requirement.

Gerdom introduced evidence of three arguably similar job positions: pilots, ticket sales agents, and directors of passenger service. Pilots and sales agents have never been subject to any weight requirement, while directors of passenger service did not have to comply with weight requirements until 1969, when Continental imposed a requirement that had more lenient standards and penalties and was enforced more leniently than the regulation which applied to flight hostesses.

While the ease with which working conditions can be compared depends on the similarity between the jobs being compared, a woman is not precluded from alleging disparate treatment even though there are no men employed in her job. *See County of Washington v. Gunther*, 452 U.S. 161, 178-79 (1981) (a disparate treatment Title VII action challenging lower wages for women was not barred even though only women were employed in the lower paid job category); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). A comparison of somewhat dissimilar jobs is permitted in determining whether a plaintiff has made out a prima facie case of disparate treatment because intent must ultimately be proved. Intent will not be inferred merely from the fact that there are differences in wages or working conditions.

I would conclude that Gerdom's allegation of disparate treatment between flight hostesses and directors of passenger service is sufficient to establish a prima facie case of unlawful disparate treatment.[2] Although Gerdom's allegation and initial offer of proof do not precisely match the four elements of a prima facie case outlined in *McDonnell Douglas*, 411 U.S. at 802, they are nonetheless sufficient. The Supreme Court explained that the four *McDonnell Douglas* elements need not be applied strictly and that a plaintiff's initial burden is flexible and will depend on the particular circumstances. *Burdine*, 450 U.S. at 253-54 n.6; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977); *McDonnell Douglas*, 411 U.S. at 802 n.13. To meet this threshold burden, a plaintiff need only introduce sufficient evidence which, if not rebutted, would support the necessary inference that "it is more likely than not that [the challenged employment decision was] 'based on a discriminatory criterion illegal under the Act.' " *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978), *quoting Teamsters*, 431 U.S. at 358 (footnote omitted). "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Burdine*, 450 U.S. at 254 (footnote omitted).

Because Gerdom met this initial burden, the burden of production shifted to Continental "to articulate some legitimate, nondiscriminatory reason" for the difference in treatment. *Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 802. An employer does not have to persuade the court that it was actually motivated by the explanation offered. *Burdine*, 450 U.S. at 254. The burden of production is met if the employer introduces sufficient admissible evidence to raise a genuine issue of fact as to whether it

unlawfully discriminated against the plaintiff on the basis of sex. *Id.* at 254-55, 257.

Continental met this burden of production by introducing evidence that the degree of customer contact with flight hostesses dictated that they maintain a more attractive personal appearance.

Once Continental met its burden, the burden of production shifted back to Gerdom and merged with her ultimate burden of persuading the court that Continental's asserted justification was not its true reason, but merely a pretext for discrimination. *Burdine*, 450 U.S. at 253, 256.

Gerdom offered evidence that the amount of customer contact with directors of passenger service was substantially similar or at least not dissimilar enough to justify the disparate treatment of flight hostesses. This offer of proof is sufficient to withstand Continental's motion for summary judgment because it creates a genuine issue of material fact about the ultimate issue in this case: whether Continental intentionally discriminated against women by imposing the stricter weight requirement on the flight hostesses. *See Ramirez v. National Distillers and Chemical Corp.*, 586 F.2d 1315, 1318 (9th Cir. 1978).

I believe the majority errs in making a factual comparison between flight hostesses and directors of passenger service. That comparison requires an evaluation of evidence that is precluded on a motion for summary judgment. *Cf. id.* at 1320-21. In my opinion the case should be remanded to the district court for trial, with direction to make this comparison and determine whether the differences justify the disparate treatment of flight hostesses.

An employer cannot avoid a charge of sex discrimination simply by giving different job titles to men and women who are performing the same job. The district court's analysis

would focus on the actual duties and function of the job, not on the job title. *See Laffe v. Northwest Airlines, Inc.*, 567 F.2d 429, 448-49 (D.C. Cir. 1976) (the airline's disparate treatment of female flight attendants in comparison with the predominantly male purser position violated Title VII because the duties of the two groups were essentially the same; the pursers had no duties that were not also performed by the flight attendants), *cert. denied*, 434 U.S. 1086 (1978).

Because Gerdom established a prima facie case of disparate treatment (which the district court did not consider when it granted summary judgment for Continental), I would remand for further proceedings. On remand Gerdom would have to offer facts to prove the comparability of the positions of flight hostess and director of passenger service in order to carry her

> ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, 411 U.S., at 804-805.

Burdine, 450 U.S. at 256. The majority goes too far in allowing Gerdom the benefit of summary judgment without having had to prove her facts at trial.

II. CLASS CERTIFICATION

I agree with the majority that the district court abused its discretion by denying Gerdom's motion to certify a class of flight hostesses who had been terminated or suspended for violating Continental's weight requirement. *See Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977). Most of the Title VII cases involving flight

attendants have proceeded as class actions encompassing both terminated and suspended flight attendants. *See, e.g., Air Line Pilots Ass'n., Int'l v. United Air Lines, Inc.*, 480 F. Supp. 1107, 1109-10 (E.D. N.Y. 1979); *Jarrell v. Eastern Air Lines, Inc.*, 430 F. Supp. 884, 886-87 (E.D. Va. 1977), *aff'd. per curiam*, 577 F.2d 869 (4th Cir. 1978). If Continental's weight requirement violates Title VII, both terminated and suspended flight hostesses are entitled to a remedy. The central issue is common to both groups of flight hostesses.

The other prerequisites of Fed. R. Civ. P. 23 are also satisfied. The numerosity requirement is satisfied by including suspended flight hostesses. Gerdom's claim is typical of the class, and it appears that she would vigorously represent the interests of the class. I would find no merit to Continental's argument that Gerdom's motion for certification was inadequately supported. She did significantly more than mimic the language of Rule 23. *See Doninger*, 564 F.2d. at 1309. A hearing should be held to determine which suspended flight hostesses were members of the class during the period in which Title VII's statute of limitations had not yet run.

I would affirm in part, reverse in part and remand.

FOOTNOTES

[1]The "sex-plus" cases are also not to the contrary. In these cases courts found unlawful discrimination where an employer discriminated against a subset of women. But these cases involved discrimination against the subset of women in favor of a similarly situated group of men. *See, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (1971) (employer's refusal to hire women with preschool children, but not men with preschool children, violated Title VII); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.) (employer's termination of female flight attendants who married, but not of male flight attendants who married, violated Title VII), *cert. denied*, 404 U.S. 991 (1971). This line of cases is inapposite because Continental's weight policy did not operate in favor of a similarly situated group of men.

[2]We confine our discussion here to the director of passenger service position because it is more similar to the flight hostess position than to the pilot or ticket sales agent positions. The directors of passenger service fly on Continental's most competitive routes and assist passengers by making reservations and arranging their connecting flights. Directors of passenger service also serve as in-flight personnel with a great deal of public contact. They are responsible for supervising the flight hostesses during the flights and perform a number of other tasks which differ from those performed by flight hostesses. They also perform some of the same duties performed by flight hostesses. The director of passenger service position involves managerial responsibilities and many directors are promoted into management positions.

APPENDIX B.

Carole A. Gerdom, Plaintiff-Appellant, v. Continental Airlines, Inc., Defendant-Appellee.

Union of Flight Attendants, Local 1, Plaintiff-Appellant, v. Continental Airlines, Inc., Defendant-Appellee.

No. 79-3215.

United States Court of Appeals, Ninth Circuit. Argued and Submitted Jan. 6, 1981. Decided June 22, 1981.

In sex discrimination action, the United States District Court for the Central District of California, Jesse W. Curtis, J., entered summary judgment in favor of defendant employer, and plaintiffs appealed. The Court of Appeals, Sneed, Circuit Judge, held that: (1) airline's weight requirements for flight attendants did not violate Civil Rights Act on theory of adverse impact on women; (2) remand was appropriate so that plaintiffs could have opportunity to attempt to establish violation on disparate treatment theory in light of different rules for flight attendants and for directors of passenger services; and (3) district court abused its discretion in refusing to certify a class of flight attendants who had been terminated or suspended for violating weight requirements.

Affirmed in part, reversed and remanded in part.

Schroeder, Circuit Judge, filed opinion concurring in part and dissenting in part.

Jay D. Roth, Taylor, Roth & Grant, Los Angeles, Cal., for plaintiff-appellant; Barrett D. Litt (on brief).

Willard Z. Carr, Jr., Los Angeles, Cal., for defendant-appellee; H. Frederick Tepker, Gibson, Dunn & Crutcher, Michael Ryan, Los Angeles, Cal., on brief.

Appeal from the United States District Court for the Central District of California.

Before SNEED and SCHROEDER, Circuit Judges, and SOLOMON*, District Judge.

SNEED, Circuit Judge:

The plaintiffs contend that Continental Airlines' weight requirements for its flight attendants violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1976), because they discriminate on the basis of sex. They advance both adverse impact and disparate treatment arguments in support of their claim. We affirm the district court's finding that the plaintiffs' adverse impact claim is without merit. But we remand for consideration of the disparate treatment claim.

I.
FACTS AND PROCEDURAL BACKGROUND

Until 1973, Continental required that its flight hostesses, then an all female position, maintain their weight below maximum weights determined from a published height/weight chart. In the wake of *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971), which held that a policy of only hiring women as flight attendants violated Title VII, Continental began hiring men and re-designated the position flight attendant rather than flight hostess. As of 1974, only two percent of Continental's flight attendants were men, and they apparently still constitute a small minority. After Continental abandoned its height/weight chart in 1973 it required flight attendants to maintain their weight in a reasonable relationship to their height, bone structure, and age.

Carole A. Gerdom was a flight hostess for Continental from 1961 until 1971. Although her record was otherwise exemplary, she was suspended without pay eight times for exceeding her maximum weight. On March 22, 1971, she

was terminated because she had exceeded her maximum weight for ninety days. Gerdom, who is 5'5½" tall, weighed 146½ pounds at that time, thirteen pounds above her maximum weight.

Gerdom sued Continental and her union, the Air Line Pilots Association (ALPA), in 1972, claiming that her termination constituted unlawful sex discrimination under Title VII. She sought to represent a class of flight attendants who had been suspended or terminated for failure to conform to Continental's weight requirements. More than eight flight hostesses or attendants have been terminated for violating the weight requirements and more than 145 have been suspended for that reason since Gerdom tolled Title VII's statute of limitations. The court dismissed the suit against the union in 1973. ALPA subsequently filed suit against Continental on behalf of flight attendants who had been suspended or terminated for exceeding their maximum weight. Gerdom's suit and the union's suit were consolidated, and the Union of Flight Attendants was substituted as a plaintiff in place of ALPA in 1977 after it replaced ALPA as the bargaining representative for the affected employees. The plaintiffs here challenge both the pre-1973 weight requirements, based on the height/weight chart, and the post-1973 requirements, based on the reasonable relationship to height, weight, and bone structure.

The district court denied Gerdom's motion to certify a class on November 19, 1973. The judge stated that the class should only consist of those women who had been terminated for failing to meet their weight requirement and should not include those who had merely been suspended. Since only eight women had been terminated, the numerosity requirement of Rule 23 of the Federal Rules of Civil Procedure was not satisfied.

The district court granted partial summary judgment in favor of plaintiffs on September 10, 1974. It concluded that the weight requirements violated Title VII because they only applied to women prior to 1972, since there were no male flight attendants then, and, since there were few male flight attendants in 1974, the requirements had a disproportionate adverse impact on women after 1972. The district court declined to issue an injunction barring Continental from enforcing its weight program, however, because it concluded that if Continental hired more male flight attendants its weight requirements would no longer have a disproportionate impact on women.

The district court judge who had issued these decisions died. Thereafter, the case was placed before another judge. This court reconsidered the decisions and, on November 27, 1978, vacated the decision granting partial summary judgment to plaintiffs. It rejected the conclusion that the weight requirements had a disproportionate adverse impact on women because there was no allegation that the requirements were more strictly applied to female flight attendants than to male flight attendants. It concluded that Continental was discriminating on the basis of weight rather than sex. Because Title VII does not bar weight discrimination, the court entered summary judgment in favor of Continental.

We agree that Continental's weight requirements had no adverse impact on women. But, in rejecting the first judge's finding of adverse impact, the district court failed to consider the plaintiffs' disparate treatment claim. The plaintiffs claim that the imposition of weight requirements on flight attendants, a predominantly female position, constitutes unlawful disparate treatment when no requirements or more lenient requirements are imposed on predominantly male positions such as directors of passenger service (DPSs), sales agents, and pilots. We remand for consideration of this claim. We

also reverse the denial of class certification and order the district court to certify a class consisting of female flight attendants who were suspended or terminated.

II.
SEX DISCRIMINATION

A. *Adverse Impact*

The plaintiffs argue that Continental's weight policy had an adverse impact on women under *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). But as the district court concluded, there was no adverse impact. In *Griggs*, blacks challenged an employer's use of educational and intellectual requirements. The Court held that the requirements violated Title VII because they operated to exclude more blacks than whites from desirable jobs and there was no business necessity for the requirements. 401 U.S. at 429-33, 91 S.Ct. at 852-853. In *Dothard*, women challenged height and weight requirements for positions in Alabama's prison system that excluded forty percent of the female population but only one percent of the male population. Because the requirements tended to exclude women, they were found unlawful for certain jobs that did not involve direct contact with male prisoners. 433 U.S. at 331-32, 97 S.Ct. at 2727-2728. These cases are inapplicable because Continental's weight requirements have not excluded women as a class from jobs as flight attendants. Some women have been excluded, but that exclusion has been on the basis of weight only. Prior to 1972, the weight requirements could not have restricted employment opportunities for women as a class because only women were hired for the position. *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892 (5th Cir. 1977). There is no evidence that the weight requirements have restricted

employment opportunities as flight attendants for women as a class since 1972. Nor is there any allegation that the requirements have been enforced more strictly against female flight attendants than against male flight attendants. Therefore, we affirm the district court's dismissal of the adverse impact claim.

B. *Disparate Treatment*

Although the adverse impact claim fails because women have not been excluded from jobs as flight attendants, a prima facie case of sex discrimination may be established under the disparate treatment theory if persons of one sex are treated differently than similarly situated persons of the other sex and no adequate explanation for the different treatment exists. *Golden v. Local 55 of the International Association of Firefighters*, 633 F.2d 817, 821 (9th Cir. 1980); B. Schlei & P. Grossman, *Employment Discrimination Law* 16 (1976). The plaintiffs claim that Continental violated Title VII by applying strict weight requirements to flight attendants — a predominantly female position — while having no weight requirements, or applying requirements more leniently, to predominantly male positions. The issue is whether the predominantly male positions are similarly situated with respect to flight attendants for purposes of Title VII so that treating them differently constitutes sex discrimination.

Continental may impose weight standards on its employees, and it may have different weight requirements for men and women of the same height to take account of physiological differences between the sexes. In *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046, 95 S.Ct. 2664, 45 L.Ed.2d 699 (1975), this court held that Title VII does not prevent employers from adopting grooming standards that differ for men and women.

The court in *Baker* affirmed the dismissal of a suit brought by a male employee who had been dismissed for violating his company's hairlength policy, which allowed women to wear their hair longer than men could. In other circuits, "Challenges to weight rules for flight attendants have been consistently rejected." B. Schlei & P. Grossman, *supra*, at 100 (1979 Supp.). Most of those cases involved claims that it was unlawful for an airline to allow male flight attendants to weigh more than female flight attendants of the same height. *See, e. g., Jarrell v. Eastern Airlines, Inc.*, 430 F.Supp. 884 (E.D.Va. 1977), *aff'd per curiam*, 577 F.2d 869 (4th Cir. 1978); *Leonard v. National Airlines, Inc.*, 434 F.Supp. 269 (S.D.Fla. 1977); *see also* Weinlein, *Flight Attendant Weight Requirements and Title VII of the Civil Rights Act of 1964*, 45 J. Air L. and Com. 503 (1980).

The plaintiffs allege, however, that Continental's weight requirements violate Title VII because they are imposed on a predominantly female job classification while similar job classifications which are predominantly male are not subject to such requirements or are subject to much more lenient requirements. The plaintiffs list three allegedly similar job classifications, pilots, sales agents, and directors of passenger service (DPSs). Pilots and sales agents have never been subject to weight requirements, while DPSs are subject to more lenient weight requirements which have allegedly been enforced more leniently than the requirements for flight attendants.

The plaintiffs' primary argument is that DPSs are similarly situated for purposes of Title VII. If DPSs are not similarly situated, *a fortiori*, pilots and sales agents are not. DPSs serve on Continental's most competitive routes, and assist passengers by arranging for connecting flights, reservations, and future flights. The plaintiffs point out that DPSs, like flight attendants, are in-flight personnel with a

great deal of public contact, and that they often perform the duties of flight attendants. Continental argues that DPSs are not similar to flight attendants because they have less public contact, perform different functions, generally come from management positions in the company and are promoted into other management positions, and because DPS is itself a management position.

In *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), female flight attendants challenged the disparate treatment accorded pursers, a predominantly male position. Pursers were in-flight personnel who served first-class passengers. Flight attendants received lower pay than pursers and were subject to weight requirements while pursers were not. The circuit court affirmed the district court's conclusion that the duties of flight attendants and pursers were essentially the same. *Id.* at 440. The court noted that pursers had no duties that were not also performed by flight attendants. *Id.* That is not the case here. The unresolved issue in this case is whether the duties of flight attendants and DPSs are so similar that no good reason exists to treat them differently with respect to weight requirements. Since it is appropriate that the district court first address this issue summary judgment in favor of the plaintiffs is unwarranted at this time.

However, a remand is appropriate so that the plaintiffs may have the opportunity to attempt to establish that the different rules for flight attendants and DPSs violate Title VII. We believe that the plaintiffs have established a prima facie case by showing that these jobs are similar, that one is predominantly male and the other predominantly female, and that the weight requirements for the jobs are different. *See Texas Department of Community Affairs v. Burdine*, ___ U.S. ___, ___ n.6, 101 S.Ct. 1089 n.6, 67 L.Ed.2d 207 (1981). Continental will meet its burden of production by advancing its reasons for treating the positions differ-

ently. The plaintiffs must then show that those reasons are mere pretexts for discrimination on the basis of sex. We note that "the disparate treatment theory of Title VII requires proof of intent." *Golden, supra*, 633 F.2d at 821. Also, the plaintiffs retain the burden of persuasion. *Burdine, supra*, 101 S.Ct. at 1095. Therefore, on remand the court must consider the similarities between the jobs, Continental's reasons for having different weight requirements for the jobs, and the parties' responses to each other's assertions, in order to determine whether the plaintiffs have shown intentional discrimination.

III.
CLASS CERTIFICATION

The district court abused its discretion in refusing to certify a class of flight attendants who had been terminated or suspended for violating continental's weight requirements. *Doniger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1308 (9th Cir. 1977). Almost all of the flight attendant cases have proceeded as class actions involving suspended and terminated flight attendants. *See, e. g., ALPA v. United Air Lines, Inc.*, 21 E.P.D. ¶ 30,419, at p. 13,373 (E.D.N.Y.1979); *Jarrell, supra*, 430 F.Supp. at 886-87. If Continental's weight requirements are found to be in violation of Title VII, both suspended and terminated flight attendants will be entitled to a remedy. Thus, the central issue of this case is a common issue of concern to both suspended and terminated flight attendants. Each of the other requisites of Rule 23 is satisfied: If flight attendants who were suspended are included in the class, the numerosity requirement is satisfied; the named plantiffs' claims are typical of the class; and it appears that the named plaintiff will vigorously represent the interests of the class. We find no merit in Continental's argument that the plaintiffs' mo-

tion for class certification was inadequately supported. The plaintiffs did significantly more than mimic the language of Rule 23. *See Doniger, supra.* Therefore, a class of terminated and suspended flight attendants should be certified. Since there was a dispute as to which suspended flight attendants should be included in the class because of Title VII's statute of limitations, a hearing should be conducted on that issue.

Affirmed in Part, Reversed and Remanded in Part.

SCHROEDER, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that a prima facie case of discrimination has been shown, and that the certified class should contain all the women who were suspended or terminated during the relevant period as a result of Continental's weight restrictions. In my view, however, Continental has already had ample opportunity to justify the policies, and has not done so. I therefore disagree with the majority's refusal to consider the inadequate justifications offered by the employer and with its decision to remand for further proceedings on liability in this already protracted case. I also disagree with the majority's approval of *Stroud v. Delta Airlines*, 544 F.2d 892 (5th Cir.), *cert. denied*, 434 U.S. 844, 98 S.Ct. 146, 54 L.Ed.2d 110 (1977), which makes discrimination in segregated job classifications needlessly burdensome to prove.

During the period in question, Continental enforced, as a condition of employment, rigid weight requirements for flight attendants, all of whom were women. No such restrictions were enforced against any male employees, not even "directors of passenger service", who, under a different title, were also serving passengers during flights. As a result of the weight requirements, the women were sub-

jected to embarrassing monthly weigh-ins, many pursued debilitating diets, and those sought to be represented in this litigation were subjected to actual suspension and termination.

The weight requirements at issue had no relationship to a flight attendant's physical ability to perform the job. There is no suggestion that the plaintiffs in this case performed less ably when they weighed 136 pounds as opposed to 135. The record reflects that no disciplinary action was ever taken against males during this period, even though several admitted that they consistently exceeded their maximum allowable weight. This is not a case where functionally similar grooming requirements were required of both men and women. *Contrast, Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974).

Continental attempts to justify the weight restrictions for women, as well as its different treatment of the male DPSs, by asserting that the policy for the female flight attendants was a business judgment implementing the "image" which the airline wished to project and that male DPSs were exempted from such onerous restrictions because the men would eventualy perform management rather than service functions. In my view, these explanations simply highlight the injustice which has been done to the women involved.

This case, which was instituted in 1973, is another, and particularly stale phase of the legal efforts to remedy the effects of discriminatory airline policies designed to insure that passengers were served by females who were "young, nubile, fashionably thin, and single." Heenan, *Fighting the "Fly-Me" Airlines*, 3 Civil Liberties Rev. No. 5 at 48 (1976-77). *See also* Binder, *Sex Discrimination in the Airline Industry: Title VII Flying High*, 59 Cal.L.Rev. 1091 (1971). As early as 1968, when Title VII was still in its infancy, the EEOC condemned the airlines' policies of

mandatory retirement for stewardesses at age 32 or 35 as "part and parcel" of the policy of sex discrimination. *Dodd v. American Airlines, Inc.*, CCH Empl.Prac.Dec. ¶ 6001 (EEOC 1968). Damages for those stewardesses who suffered on account of the "no-marriage" rule were upheld by this Circuit in *Sangster v. United Airlines*, 633 F.2d 864 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 1766, 68 L.Ed.2d 243 (1981). Within the past year, the practices within the airline industry toward women prompted judges of the fourth circuit to note that "the long history of sex discrimination by . . . airlines generally certainly makes suspect the claim of business necessity for any employment practice resulting in a prima facie discrimination." *Burwell v. Eastern Airlines, Inc.*, 633 F.2d 361, 372 (4th Cir. 1980) (en banc), *cert. denied*, ___ U.S. ___, 101 S.Ct. 1480, 67 L.Ed.2d 613 (1981) (Sprouse, C.J.).

No business necessity for the discriminatory policies involved here has been articulated. Being a female is not a bona fide occupational qualification for flight attendants. *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971). "The primary function of an airline is to transport passengers safely from one point to another." *Id.* at 388. The airline is thus in the business of providing safe transportation, not feminine sex appeal.[1]

In considering the nature of the discrimination involved, the majority holds that the restrictions had no adverse impact on women. Yet the effects of the policies were felt only by women, and it is simply illogical to conclude that the effects of suspension or termination were not adverse. The majority reaches that conclusion by adopting the view, espoused by the Fifth Circuit, that a job qualification imposed solely on women has no adverse impact so long as only women are in the affected job classification, and those who lose their

jobs as a result of the policy are replaced by members of the same sex. *Loper v. American Airlines*, 582 F.2d 956 (5th Cir. 1978); *EEOC v. Delta Airlines, Inc.*, 578 F.2d 115 (5th Cir. 1978); *James v. Delta Airlines*, 571 F.2d 1376 (5th Cir. 1978); *Stroud v. Delta Airlines, Inc.*, 544 F.2d at 893. The result of the Fifth Circuit's approach is that employees in segregated job classifications can demonstrate unlawful discrimination only by showing that others similarly situated are not similarly treated. They must therefore overcome the kind of argument made by the employer in this case, i. e., that since all of the flight attendants were women, there were by definition no men similarly situated who were treated differently.

Fortunately the majority recognizes that the plaintiffs here were able to make at least a prima facie showing of disparate treatment, since there was a male classification, DPSs, performing similar duties. *See also Laffey v. Northwest Airlines, Inc.*, 366 F.Supp. 763 (D.D.C.1973), *aff'd*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978). Others who are in segregated jobs and are held to such a standard may not be so fortunate.

> [I]n highly sex-segregated establishments, the few male employees often occupy totally dissimilar positions from the majority of female employees. The waitress who is fired when she gets too old to be considered alluring, for instance, is hard put to compare her treatment to that accorded the restaurant manager. . . . [A]ttempts to expand the concept of disparate treatment in this fashion give the employer a further incentive to segregate its work force.

Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L.Rev. 345, 399-400 (1980).

I would hold that whenever an employer applies a rule only to employees in a sex-segregated job classification and not to other employees, a prima facie case of discrimination has been shown. This would be true under either disparate treatment or disproportionate impact analysis. I thus agree with the Seventh Circuit's decision in *Sprogis v. United Airlines*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971). The Court there invalidated the no-marriage rule for airline stewardesses, stating that when an occupational position is filled only by women, the employer may impose an additional qualification, not imposed upon male employees "if and only if that requirement reflects an inherent quality reasonably necessary to satisfactory performance of the duties of stewardesses . . . ." *Id.* at 1199. *See also In re Consolidated Pretrial Proceedings in Airline Cases*, 582 F.2d 1142, 1145 (7th Cir. 1978), *cert. granted sub nom., TWA v. Zipes*, ___ U.S. ___, 101 S.Ct. 1511, 67 L.Ed. 813 (1981).[2]

The weight restrictions enforced here were not reasonably necessary to performance of the duties of flight attendants. The plaintiffs have demonstrated discrimination and I would remand this case with instructions that the district court enter judgment in favor of the plaintiffs on liability and proceed to a determination of the appropriate class and remedy.

FOOTNOTES

*Honorable Gus T. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]In *Harriss v. Pan American World Airways, Inc.*, 637 F.2d 1297, 1302 (9th Cir. 1980), the majority recently held that an airline policy which required female flight attendants to stop work as soon as they learned they were pregnant was justified as a business necessity because occasional dizziness, nausea, and fainting in early pregnancy could interfere with passenger safety. Ironically, in this case the plaintiffs have contended that the promotion of thinness and crash dieting could undermine the attendants' performance in an emergency, and this airline has taken the position that the primary responsibility of flight attendants is to please customers and has nothing to do with safety. The "business" justification for this policy is, in reality, the same stereotyping rejected in *Diaz*.

[3]*See also, Dodd v. American Airlines, Inc.*, CCH Empl.Prac.Dec. ¶ 6001 (1968), which rejected an argument that since all stewardesses were female, any conditions of employment could not be sex discrimination. "The concept of discrimination based on sex does not require an actual disparity of treatment among male and female employees presently in the same job classification. It is sufficient that a company policy or rule is applied to a class of employees because of their sex, rather than because of the requirements of the job." If all the holders of one job are of one sex and a particular condition of employment is applied to them, and not to other employees, the condition must be relevant to satisfactory job performance. *See also Neal v. American Airlines*, CCH Empl.Prac.Dec. ¶ 6002 (1968).

APPENDIX C.

Opinion.

United States District Court, Central District of California.

Carole A. Gerdom, Plaintiff, v. Continental Air Lines, Inc., Defendant. No. CV 72-663-JWC.

Air Line Pilots Association, International, Plaintiff, v. Continental Air Lines, Inc., Defendant. No. CV 73-2503-JWC.

Filed: November 27, 1978.

These consolidated actions are brought under Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e-2(e) and 2000e-5. In No. CV 72-663, plaintiff Carole Gerdom alleges that she was suspended and terminated as a flight hostess by Continental Air Lines, Inc. because of her failure to meet Continental's weight standards for flight hostesses, the enforcement of which standards, she alleges, violate Title VII. In No. CV 73-2503, Air Line Pilots Association, International (ALPA) suing on behalf of itself and all flight hostesses employed by Continental and represented by ALPA challenges Continental's weight program as violative of Title VII.

FACTUAL BACKGROUND

Continental has maintained, applied, and enforced some form of weight standard requirements for its female flight hostesses since 1934. Written standards have been enforced continuously since 1963. While the weight standard requirements have changed in certain respects over the years, at least until July 1973, flight hostesses were required by Continental to maintain their weight below a certain maximum weight for their height in accordance with a published

height/weight chart incorporated by Continental into the flight hostess manuals.

Continental has consistently disciplined its hostesses for failure to comply with its weight standards. Approximately thirty-three hostesses have been terminated by Continental for noncompliance with the standard, although in some of these cases the hostesses in question were also guilty of noncompliance with other rules. At least 145 hostesses have been suspended on over 300 occasions, and numerous letters of warning and reprimand have been issued to hostesses failing to comply with these weight standards. Finally, those hostesses who have been suspended or terminated have lost seniority, bidding rights, and access to health insurance and retirement benefits.

Although the plaintiff Gerdom admittedly had an exemplary work record in other respects, she was suspended without pay on six different occasions between 1965 and 1969 for failure to meet the weight requirements and was ultimately forced to submit her resignation on March 22, 1971 because of her inability to bring her weight within acceptable limits.

After Gerdom's termination and the commencement of the present action, Continental changed its weight requirements. In July of 1973, the company promulgated a "general appearance standard" which provided, *inter alia*, "weight should be maintained in reasonable relationship to height, bone structure, and age." Thus, Continental no longer uses a rigid height/weight standard to set a maximum weight, but rather uses the "reasonable relationship" formula.

ALPA challenges the new standard for the same reason it challenges the old standard, contending that there is no

significant difference between them and that both violate Title VII.

Prior to November 1972, and during plaintiff Gerdom's employment, these weight standards were applied solely to "flight hostesses", a category consisting entirely of women. In November 1972, Continental did hire some men to fulfill the duties formerly performed solely by women hostesses and renamed such persons "flight attendants". As of January 1973, Continental employed 1,326 flight attendants of whom four, or .30%, were male. As of January 1974, out of 1,324 flight attendants, 28, or 2%, were male. Since November 1972, it is undisputed that Continental has applied rules regarding weight standards to both male and female flight attendants. The standards differ between the sexes based solely upon the conceded physiological differences in structure which affect height and weight.

Continental also had one other classification of employee to which it applied weight standards, the Director of Passenger Service (DPS). These employees act in a supervisory capacity over flight attendants, ensuring a high standard of customer service. Their duties include performing in-flight ticketing for connecting flights, assisting customers in overcoming any irregularities, filling out various reports, and occasionally assisting the flight attendants in serving food and beverages. Directors of Passenger Service, unlike flight attendants, are not members of the union; Continental considers them to be management representatives. Their presence is not required on any flight, but they are usually aboard the highly competitive routes. Until June of 1972, all of them were male, but as of May 1973, Continental employed 123, of whom four, or 3.3%, were female.

Although Continental selected its first DPS in 1959, no weight standard of any type was imposed upon that group until 1969. In that year however, and thereafter, weight

standards have been applied to all flight attendants. If there be a difference in treatment as between DPSes and other flight attendants, plaintiff makes no point of it. Plaintiff simply considers DPSes to the extent that they are male members of the group as against which should be measured the disproportionate impact which plaintiff contends is suffered by the female members of that class.

Having made this factual showing, all parties moved for summary judgment. The trial court, then presiding, denied defendant's motion for summary judgment but granted partial summary judgment in favor of the plaintiffs, holding that the weight standard as applied violated Title VII.

Subsequently, the trial judge died and the case was transferred to this court for further proceedings which include defendant's present motion to reconsider the earlier ruling on the summary judgment motions.

The earlier ruling was made in 1974 at a time when Title VII was relatively new and there was much confusion among the courts as to the true intent of Congress. Since that time, Title VII has been the subject of much scholarly analysis, both in academic literature and court decisions, in the light of which a reexamination of the applicable law at this time seems appropriate.

GERDOM v. CONTINENTAL, No. CV 72-663-JWC

In granting partial summary judgment in favor of the plaintiff Gerdom, the former judge, in Findings of Fact and Conclusions of Law, set forth those facts upon which he relied in reaching his conclusions.[1] Essentially he found (1) that the plaintiff Gerdom, although otherwise an acceptable employee, had been terminated because of her failure to comply with the weight requirement then imposed upon all "flight attendants", (2) that the weight requirement was based upon an appearance standard and not upon health

considerations, and (3) that during the period of plaintiff's employment, the "flight attendant" position was composed exclusively of females. From these facts the court concluded that Continental had violated Title VII of the Civil Rights Act of 1964 by "terminating and suspending Gerdom under a weight program for flight attendants which discriminated unlawfully on the basis of sex because said requirements applied only to females." Based upon this conclusion of law, the court granted summary judgment in favor of the plaintiff.

It is important to note that plaintiff Gerdom does not claim, nor could she, that the defendant has been guilty of discrimination under Title VII by employing only women in the "flight attendant" category, for being a woman and thus a member of the favored class, the plaintiff has no standing to object. This was made clear in *Stroud v. Delta Airlines*, 544 F.2d 892 (5th Cir. 1977), *cert. denied*, 434 U.S. 844 (1977). In *Stroud*, the Court noted that while the employment of only women as flight attendants was a discriminatory practice, unlawful under Title VII, a female plaintiff had no standing to assert the rights of the prospective male attendants as she was not a member of this disadvantaged class. 544 F.2d 892-94. *See Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

There has been no contention that Continental was guilty of any impropriety in carving out of their total group of female employees the classification of "flight attendants". The specialized function of the members of this group and their personal contact with passengers justified such a classification.

In essence, plaintiff contends only that the application of the weight standard to "flight attendants" produces a disproportionate adverse impact upon females as a class in that

it results in numerically more female than male employees of the defendant being terminated for noncompliance within the job classification. Accepting this contention at face value, plaintiff is simply not a member of one of the relevant identifiable classes which has been disadvantaged in favor of another such class. The appropriate analytical focus here must be upon the job category of "flight attendants" of which plaintiff was a member and which was composed only of women. Under the standards at issue, certain women "flight attendants" who maintain their weight within the prescribed limits are favored over those women "flight attendants" who do not. Thus the discrimination is based upon weight and not upon sex; such discrimination manifestly is not within the purview of Title VII or this court's power to proscribe. This is not a case where male employees are unjustifiably favored over female employees within the same job classification; men are simply not involved in the discriminatory effects of the policy. *Stroud v. Delta Airlines, Inc., supra.* This being so, Title VII is simply not applicable here and plaintiff is not entitled to any relief pursuant to its provisions in light of the species of discrimination alleged.

At issue here is essentially an appearance standard, and it is now well established that a private employer may impose reasonable appearance standards upon its employees. *Jarrell v. Eastern Airlines, Inc.*, 430 F. Supp. 884 (E.D. Va. 1977); *Cox v. Delta Airlines*, 14 F.E.P. Cas. 1767 (S.D. Fla. 1976), *aff'd*, 553 F.2d 99 (5th Cir. 1977); *Baker v. California Land Title Company*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975). It is also well settled that reasonable appearance standards may differ as applied to men and women without violating either Title VII or the Constitution. *See Laffey v. Northwest Airlines*, 567 F.2d 429 (D.C. Cir. 1976); *Earwood v. Continental*

Southeastern Lines, Inc., 539 F.2d 1349, 1351 n.6 (4th Cir. 1976); *Baker v. California Land Title Company, supra.*

Plaintiff argues that Continental's weight requirements are unreasonable. Initially, it is important to recognize that such a contention is irrelevant in determining whether a Title VII violation has occurred due to the application of the weight requirements here at issue. Moreover, plaintiff has mistakenly attempted to define the acceptable standard of reasonableness in terms of the Bonafide Business Requirement defense of Title VII which comes into play only where a violation has been established. 42 U.S.C. § 2000e-2(e) (1976). It was not the intent of Congress to impose upon employers the rigid requirements of this defense in cases such as this where the facts do not support the allegations of discrimination based on sex. It may be that patently unreasonable appearance standards which would be injurious to health or impose other unjustified burdens upon employees would give rise to an action based upon constitutional principles. However, the plaintiff has made no significant showing in this regard and, more important, has based her claim upon the provisions of Title VII. Irrespective of whether the standards are reasonable or not, no sex-based discrimination has occurred and thus plaintiff's claim must fail.

An employment policy such as the one at bar which includes grooming standards is related more closely to the employer's legitimate discretion regarding how he wishes to operate his business than to equality of employment opportunity. These are the kinds of choices which allow some businesses to succeed while others fail—the kinds of choices with which the courts should not interfere in the absence of objections based upon cognizable constitutional or statutory authority.

As to the plaintiff Gerdom, therefore, the partial summary judgment in her favor must be vacated and, since it appears that upon the undisputed facts, the defendant is entitled to judgment as a matter of law, a judgment of dismissal shall issue.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL v. CONTINENTAL AIR LINES, INC., No. CV 73-2503-JWC

The claims of ALPA vary only slightly from those asserted by the plaintiff Gerdom in her case. ALPA sues on behalf of all female flight attendants employed by Continental and represented by ALPA. Basically, the undisputed facts which the judge relied upon in his ruling are as follows: (1) that some of the flight attendants employed by Continental and represented by ALPA had been terminated because of their failure to comply with the weight requirements then in effect, although they were otherwise qualified for such employment, (2) that after males were employed as flight attendants, beginning in December 1972, the weight standards were applied to all flight attendants, although their maximums varied with the individuals depending upon legitimate physiological differences, and (3) as of January 1973, Continental employed 1,326 flight attendants, of whom four, or .30% were males. As of January 1974, Continental employed 1,324 flight attendants, of whom 28, or 2% were male. From these facts, the court concluded that Continental had violated Title VII of the Civil Rights Act of 1964, as amended, "by terminating or suspending female flight attendants under a weight, and later under appearance, program which discriminated unlawfully on the basis of sex because until November 1972, only females were employed as flight attendants, and as of January 1974, only two percent of the flight attendants employed were

men, the result being a disproportionate number of females to males in the flight attendant classification."[2]

In this case, to the extent that we are dealing with the period prior to November 1972 when only females were employed as flight attendants, the same considerations set forth in the *Gerdom* case are applicable and demand the same result. In the present case, however, the union is also suing on behalf of females who have been terminated during the period when flight attendants embraced both sexes.

Plaintiff's position is that the enforcement of a weight standard in a classification almost entirely dominated by women places an undue burden on the employment opportunities of women since numerically more women employees of the defendant are apt to be affected than men. The court in *Jarrell v. Eastern Airlines, Inc., supra,* had before it almost an identical problem. Eastern maintained an all female flight attendant group prior to 1970, after which time a few male stewards were added. An appearance standard was enforced, including weight restrictions which were remarkably similar to those in the instant case. Both males and females were required to conform to the weight standards, and similar sanctions were available for failure to comply. In rejecting plaintiff's claims, virtually identical to those in the instant case, the court said:

> "That the weight program is a facet of an overall personal appearance policy applicable to flight attendants is acknowledged by all of the parties. There is virtual unanimity among the Circuit Courts of Appeals that an employer may impose reasonable personal appearance requirements upon its employees and such standards need not be identical for males and females. Such practices are said to be non-sexually discriminating. *See Earwood v. Continental Southeastern*

Lines, Inc., supra, 539 F.2d at 1351 and cases cited at n.6." 430 F. Supp. at 891

". . . [t]he touchstone in most Title VII cases is the effect or impact of the contested employment practice upon the relevant class. *Gilbert v. General Electric Co.*, 429 U.S. 125, 162, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). Eastern's weight program has not produced any restriction in employment opportunities for women. Nor can the argument be made that the weight control program is a pretext for limiting employment to one sex. The flight attendant remains an overwhelmingly female dominated position. 'The objective of Title VII is to equalize employment opportunities.' *Earwood v. Continental Southeastern Lines, Inc., supra,* 539 F.2d at 1351. In light of the female dominance of the flight attendant position, the plaintiffs' attempt to prove discriminatory effect falls short. While the percentage of females subjected to disciplinary actions exceed that for males for the years 1972 and 1973, the Court concludes that the differences are not sufficiently great as to attain legal signficance. *See Roman v. ESB, Inc.*, 550 F.2d 1343 (4th Cir. 1976) (en banc)." 430 F. Supp. 892

In summary, prior to November 1972, when Continental's flight attendant group consisted entirely of females, the weight control program enforced against that group does not violate the prohibitions of Title VII. As to the period from November 1972 until this action was filed, during which time some male members of flight attendants were employed, weight standards were established wherein maximum requirements varied as to the physiological characteristics of the employees. There is no contention that the standard is unfairly or discriminatorily applied and there are no facts alleged to support the contention that the weight standards result in a disproportionate adverse effect upon

the female members of the class. The mere fact that numerically there may be more terminations of female versus male flight attendants because of the overwhelming preponderance of female members of the class, does not, in itself, demonstrate that the burden is "disproportionate". Continental has simply selected its employees on the basis of a legitimate appearance standard, which includes weight, without regard to sex. This policy, in the absence of a specific discriminatory practice directed against a protected class, does not fall within the prohibitions of Title VII. *Jarrell v. Eastern Airlines, Inc., supra,* at 892.

Accordingly, the partial summary judgment in favor of the plaintiff ALPA must be vacated. It appearing that on the undisputed facts, the defendant Continental Airlines is entitled to judgment as a matter of law, summary judgment of dismissal in defendant's favor shall issue.

DATED: November 20, 1978

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

FOOTNOTES

FINDINGS OF FACT

1. This action was brought by Carole A. Gerdom ("Gerdom"), a flight hostess for Continental Air Lines, Inc. ("Continental") from March 9, 1961 until March 22, 1971. She was forced to resign from said position by Continental on March 22, 1971 for failure to comply with Continental's weight standard requirements.

2. Continental is a corporation with offices in and doing business in this judicial district. Continental employs more than twenty-five employees and is subject to Title VII of the Civil Rights Act of 1964, as amended.

3. Air Line Pilots Association, International ("ALPA") is the duly certified and recognized exclusive collective bargaining representative for flight attendants employed by Continental. Gerdom was a member of ALPA from September 1961 until March 22, 1971.

4. On or about August 9, 1971, Gerdom filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). Said charge was deferred to the California Fair Employment Practice Commission and the EEOC assumed jurisdiction on November 23, 1971. Gerdom demanded and received from the EEOC by letter dated March 15, 1972, statutory notice of her right to proceed in court. Gerdom filed the Complaint in Civil Action No. 72-663-EC on March 24, 1972.

5. On December 3, 1973, the Court consolidated Gerdom's action (No. 72-663-EC) with the action filed by ALPA against Continental on October 25, 1973 (No. 73-2503-EAC).

6. During Gerdom's employment, Continental maintained a weight program under which flight attendants were required to maintain their weight below a certain maximum for their height. If flight attendants failed to comply with certain aspects of the weight program, they could be suspended and terminated under the weight program. Female flight attendants were suspended and terminated under the weight program. This weight program applied only to females.

7. On July 28, 1965, Gerdom was suspended from duty without pay for failure to meet Continental's weight requirements. She weighed 135½ pounds instead of the 135 pounds required by that date by Continental's weight reduction schedule. She remained suspended until August 4, 1965, when her weight conformed to Continental's allowed maximum of 131½ pounds for her height.

8. Sometime subsequent to March 16, 1966, Gerdom was suspended from duty without pay for failure to meet Continental's weight reduction schedule. She was placed on said schedule because she weighed 141 pounds. She remained suspended until May 11, 1966, when her weight conformed to Continental's allowed maximum for Gerdom of 133½ pounds.

9. On August 25, 1966, Gerdom was suspended from duty without pay for failure to meet Continental's required weight of 133½ pounds. She weighed 136½ pounds. She remained suspended until September 20, 1966, when her weight conformed to Continental's allowed maximum for Gerdom.

10. On August 28, 1967, Gerdom was suspended from duty without pay for failure to meet Continental's required weight of 133½ pounds. She weighed 141 pounds. She remained suspended until November 6, 1967, when her weight conformed to Continental's requirements.

11. On January 16, 1968, Gerdom was suspended from duty without pay for failure to meet Continental's required weight of 133½ pounds.

She weighed 137½ pounds. She remained suspended until January 29, 1968, when her weight conformed to Continental's requirements.

12. On July 10, 1969, Gerdom was suspended from duty without pay for failure to meet Continental's required weight of 133½ pounds. She weighed 144 pounds. She remained suspended until September 11, 1969, when her weight conformed to Continental's requirements.

13. On May 14, 1970, Gerdom was suspended from duty without pay for failure to meet Continental's required weight of 133½ pounds. She weighed 147¾ pounds. She remained suspended until August 11, 1970, when her weight conformed to Continental's requirements.

14. On November 25, 1970, Gerdom was suspended from duty without pay for failure to meet Continental's required weight of 133½ pounds. She weighed 137¾ pounds.

15. Because Continental's policy that a hostess would be terminated for failing to meet the allowable maximum weight after 90 consecutive days of suspension for weight, and after exhausting all her vacation days, Gerdom was forced to submit her resignation as a hostess on March 22, 1971. She weighed 146½.

16. The above suspensions and termination of Gerdom were based on appearance. No suspension or termination was based on health considerations.

17. During the period of Gerdom's employment with Continental, the flight attendant position was exclusively female ("hostess").

18. Other than her periodical failure to satisfy Continental's weight requirements, Gerdom maintained an excellent work record as a hostess throughout her employment with Continental.

19. Each year of Gerdom's employment she was found to be in good health by her annual Continental physical examination.

20. Gerdom did not apply for a job with any other airline after her resignation from Continental.

21. Gerdom was suspended without pay a total of eight times because her weight exceeded her allowable maximum.

22. Gerdom has not been reinstated as a flight hostess. She has not been compensated for lost pay, nor has her lost seniority or other lost benefits been restored.

23. All Findings of Fact set forth under the heading "Conclusions of Law" are incorporated herein by reference.

CONCLUSIONS OF LAW

1. All Conclusions of Law appearing under the heading "Findings of Fact" are incorporated herein by reference.

2. There is no genuine issue as to any material fact above stated relevant to the claims of Gerdom against Continental which would preclude the granting of summary judgment to Gerdom on the liability issues in this case.

3. Gerdom has filed a timely charge with the EEOC and filed a timely Complaint in Court. Therefore, Gerdom has satisfied the jurisdictional prerequisites for maintenance of an action under Title VII and the Court has jurisdiction over the parties and over the subject matters of this action.

4. Venue properly lies in this Court.

5. Continental has violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2(a) (hereinfter "Title VII") by terminating and suspending Gerdom under a weight program for flight attendants which discriminated unlawfully on the basis of sex because said weight requirements applied only to females.

6. Gerdom is entitled to summary judgment against Continental on the liability issues in this case as a matter of law.

7. Continental is not entitled to summary judgment against Gerdom.

DATED: SEP 11 1974

/s/ E. AVERY CRARY
United States District Judge

FINDINGS OF FACT

1. This action was brought by the Air Line Pilots Association, International ("ALPA"), the certified exclusive collective bargaining representative for flight attendants employed by Continental Air Lines, Inc. ("Continental").

2. Continental is a corporation with offices in and doing business in this judicial district. Continental employs more than twenty-five employees and is subject to Title VII of the Civil Rights Act of 1964, as amended.

3. On September 13, 1972, ALPA filed a charge with the Equal Employment Opportunity Commission ("EEOC") claiming, *inter alia*, that Continental had engaged in unlawful employment practices of sex discrimination on a continuing basis by maintaining and enforcing arbitrary and discriminatory weight standard requirements for female flight hostesses employed by Continental.

4. On October 18, 1973, the EEOC notified ALPA, by letter, that it had sent a copy of the Charge of Discrimination to the Illinois Fair Employment Practice Commission.

5. On October 19, 1973, ALPA received notice dated October 17, 1973, of the right to sue in the United States District Court from the EEOC pursuant to Section 706(3) of the Civil Rights Act of 1964, as amended.

6. On October 25, 1973, ALPA filed a Complaint on behalf of itself and for and in the interest of all flight hostesses employed by Continental and represented by ALPA. On December 3, 1973, the Court consolidated ALPA's action with that previously filed by Carole A. Gerdom against Continental and ALPA.

7. Until July 1973, Continental maintained a weight program under which flight attendants were required to maintain their weight below a certain maximum for their height. If flight attendants failed to comply with certain aspects of the weight program, they could be suspended or terminated. Female flight attendants were suspended and terminated under the weight program. No male employees of Continental were subject to any comparable weight restrictions and no male flight attendants were employed until November 1972.

8. In July 1973, Continental instituted an appearance program for flight attendants which provides that weight should be maintained in a reasonable relationship to height, bone structure and age. The appearance program applies to male and female flight attendants. Flight attendants who fail to comply with the appearance program are counselled by their supervisors and may be suspended if they fail to show progress. Flight attendants have been suspended under the appearance program.

9. Continental employed no males as flight attendants until November 1972, and males did not actually begin flying until December 1972. The weight program in effect for female flight attendants applied to male flight attendants upon their employment with different weight maximums based upon physiological differences.

10. Continental hired thirty-five male flight attendants as of December 1973, and fifty-five as of July 1974.

11. As of January 1973, Continental employed 1,326 flight attendants, of whom four, or .30 percent were male. As of January 1974, Continental employed 1,324 flight attendants, of whom twenty-eight, or two percent were male.

12. No female flight attendant discharged for failure to meet weight requirements has been offered reinstatement. No female flight attendant

suspended for failure to meet weight requirements has been offered compensation for the periods of suspension.

13. All Findings of Fact set forth under the heading "Conclusions of Law" are incorporated herein by reference.

CONCLUSIONS OF LAW

1. All Conclusions of Law appearing under the heading "Findings of Fact" are incorporated herein by reference.

2. There is no genuine issue as to any material fact above stated relevant to the claims of ALPA against Continental which would preclude the granting of summary judgment to ALPA on the liability issues in this case.

3. ALPA has filed a timely charge with the EEOC within 180 days of the commission of an alleged act of discrimination. ALPA filed a Complaint in court within 90 days of receipt of a notice of right to sue from the EEOC. Therefore, ALPA has satisfied the jurisdictional prerequisites for maintenance of an action under Title VII, and the Court has jurisdiction over the parties and over the subject matter of this action.

4. Venue properly lies in this Court.

5. ALPA has brought this case in its representative status and has not been required to comply with Rule 23 of the Federal Rules of Civil Procedure.

6. Continental has violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2(a) (hereinafter "Title VII"), by terminating or suspending female flight attendants under a weight, and later appearance, program which discriminated unlawfully on the basis of sex because until November 1972, only females were employed as flight attendants, and as of January 1974, only two percent of the flight attendants employed were men, the result being a disproportionate number of females to males in the flight attendant classification.

7. An injunction is not appropriate at this time because Continental has made progress in connection with remedying the discrimination found in the preceding conclusion with its new appearance program and by hiring male flight attendants. The Court will review the circumstances on or after February 17, 1975. An appearance program including weight which does not apply disproportionately to one sex is not in violation of Title VII if there are a proportionate number of males to females employed as flight attendants.

8. ALPA is entitled to summary judgment against Continental on the liability issues in this case as a matter of law.

9. Continental is not entitled to summary judgment against ALPA.

DATED: SEP 6 1974

/s/ E. AVERY CRARY
United States District Judge

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